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No. 89-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

◆

STATE OF HAWAII,

Petitioner,

v.

HAILA DIANE ROMAN,

Respondent.

◆

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

◆

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QUESTIONS PRESENTED

Whether, in light of the principles of *Miranda v. Arizona,* 384 U.S. 436 (1966), and its progeny, the court below erred in sustaining the suppression of statements made by a complaining witness on its view, *inter alia,* that (1) a voluntary polygraph examination became "custodial" under *Miranda,* when, as a result of statements made by the witness, the investigation "focussed" on her own criminal conduct, and (2) warnings at the start of examination did not justify continued questioning without new *Miranda* warnings, after the police officers' "focus" changed?

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STATE OF HAWAII,

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v.

HAILA DIANE ROMAN,

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◆

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

◆

Petitioner State of Hawaii respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Hawaii entered in this action April 11, 1989.

◆

OPINIONS BELOW

The opinion of the Supreme Court of Hawaii is reported at 772 P.2d 113 (Haw. 1989), and is reprinted in Appendix A. The April 19, 1988, Findings of Fact, Conclusions of Law and Order Regarding Defendant's Motion to Suppress Oral and Written Statements, entered by the

Circuit Court of the First Circuit, State of Hawaii, are not reported, and are reprinted in Appendix B.

JURISDICTION

The judgment of the Supreme Court of Hawaii was entered on April 11, 1989, and is final for purposes of this Court's jurisdiction. *See, e.g., New York v. Quarles,* 467 U.S. 649, 651 n.1 (1984). Under 28 U.S.C. § 2101, the time in which this Petition may be filed extends to and includes July 10, 1989, and this Petition was timely filed. The grounds for reversal were timely presented to the state trial court (Pet. App. 71-83), and on appeal in the court below (Pet. App. at 25-48), or were otherwise passed upon by the Supreme Court of Hawaii. *See, e.g., Illinois v. Gates,* 462 U.S. 213, 217-23 (1983). The state Supreme Court also did not provide "a plain statement that the decision below rested on an adequate and independent state ground." *Michigan v. Long,* 463 U.S. 1032, 1044 (1983). The manner in which the issues here were raised or passed upon by the state courts, and the propriety of federal review under the rule of *Michigan v. Long,* are briefed more fully at pp. 9-11, 19-21, *infra.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that

> No person shall . . . be compelled in any Criminal Case to be a witness against himself[.]

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Section 710-1015 of the Hawaii Revised Statutes (1985), provides:

> (1) A person commits the offense of false reporting to law-enforcement authorities if he intentionally makes a report or causes the transmission of a report to law-enforcement authorities relating to a crime or other incident within their concern when he knows that the information contained in the report is false.
>
> (2) False reporting to law-enforcement authorities is a misdemeanor.

◆

STATEMENT OF THE CASE

The issue in this case is whether the Supreme Court of Hawaii misapplied this Court's settled law in holding that non-custodial police questioning is converted to "custodial interrogation" requiring *Miranda* warnings or their equivalent when a complaining witness's voluntary statements during a polygraph examination lead police to "focus" on the witness's own criminal conduct, and that prophylactic warnings given at the start of the examination were insufficient to permit admission of inculpatory statements at a later prosecution against the witness under the false statements act, Haw. Rev. Stat. § 710-1015 (1985).

1. On Monday, January 5, 1987, Respondent Haila Diane Roman, then serving weekends since October 1986 on an unrelated sentence at the Oahu Women's Correctional Facility, State of Hawaii, reported having been repeatedly raped by two male Corrections Officers on a series of weekends during her sentence. Pet. App. 5, 16. The Honolulu Police Department (HPD), immediately investigated. *Id.* at 16. A prompt medical examination failed to disclose any medical evidence of rape. *Id.* at 5, 16. In addition, Detective Leighton Fujinaka, the officer in charge of the investigation, after interviewing twenty-three witness, gathering physical evidence, and reconstructing the rape scenes with Roman, discovered discrepancies in her descriptions of the various rapes. *Id.* at 16. Detective Fujinaka harbored suspicions that Roman was lying, and asked her to take a polygraph examination to confirm the charges. *Id.* at 5, 17. On Thursday, January 15, 1987, at which time she was not in custody, Roman voluntarily appeared for her examination at the HPD main police station on Beretania Street in Honolulu. *Id.* at 5, 17.

2. HPD Detective John Paekukui, who had worked with Detective Fujinaka on the case, and who was trained in polygraph techniques, conducted the examination. *Id.* at 5, 17. Before starting the interview, Detective Paekukui discussed the test, informed Roman of the questions that would be used (Roman agreed to the particular questions), and the way in which the test would be conducted. *Id.* at 5, 17, 93-94. In addition, Detective Paekukui orally read, and provided printed versions of, two sets of warnings to Roman. *Id.* at 5, 17, 88-91. The first set apprised Roman that Detective Paekukui would be "ask[ing] you

questions about [a] sexual assault which occurred on or about Jan[uary] 2, 1987 at [the] Womens' Facility." *Id.*at 65-66, 80-81. The forms read and given to Roman then stated:

> But first I want to inform you of certain rights you have under the Constitution. Before I ask you any questions, you must understand your rights.
>
> You have a right to remain silent.
>
> You don't have to say anything to me or answer any of my questions.
>
> You have a right to counsel of your choice or to talk to anyone else you may want to.
>
> You have a right to have an attorney present while I talk to you, however, the attorney will not be in the room while the polygraph examination is being conducted.
>
> If you cannot afford an attorney, the court will appoint one for you.
>
> If you decide to answer my questions without a lawyer being present you still have the right to stop answering at any time.

Id. at 65, 80. The form of waiver required Roman to indicate, in writing, whether she "want[ed] an attorney now," "underst[oo]d what [Detective Paekukui] told [her]," and whether she "[w]ould . . . like to tell . . . what you know" *Id.* The form further indicated that "the results could be given to the person or persons concerned." *Id.* The second waiver stated:

> I am taking this polygraph examination without any promise or reward or hope of immunity. I am making all statements freely and voluntarily without any threats, either physical or mental, and understand

> my rights against self incrimination under the Constitution of the United States and the State of Hawaii.
>
> I have not been forced, coerced, or threatened into taking this polygraph examination. I am taking this examination on my own free will and realize that the results will be given to me at the end of this examination. The results will also be given to the investigator and persons concerned.

Id. at 82. Roman signed the forms, attesting that she understood her rights, and agreed to questioning. *Id.* at 66, 81, 82, 91.

3(a). Roman's responses during the instrument-monitored questioning caused Detective Paekukui to conclude Roman had lied about having been raped. Detective Paekukui reviewed the charts for a couple of minutes, informed Roman of his conclusion, and confronted her. *Id.* at 5, 18. At no time before this questioning did Detective Paekukui place Roman under arrest, and in fact, Paekukui told Roman at the start of the test that she did not need to take the test and was free to leave. *Id.* at 109. Detective Paekukui testified, as well, that at no time before the "post-test" questioning did Roman ask to leave. *Id.* at 110.

3(b). During this post-instrument interview with Detective Paekukui, Roman confessed to falsely reporting a crime to law enforcement authorities, a misdemeanor under Hawaii law. Haw. Rev. Stat. § 710-1015 (1985). Detective Paekukui stated:

> Q. When you informed Ms. Roman that you concluded that she was not being entirely truthful with you, what response did she give, if any?
>
> A. At first, she said that she was telling the whole truth and at that point, she wouldn't make any other

> statements that she was just telling the truth about what happened, continued to talk to her about this result of the test, and when I told her that it appeared that she was carrying a heavy burden because of this test, it would probably make her feel better instead of feeling this burden. That's when she asked me to sit down because she wanted to tell me something. This is when she told me that she lied in the test and nothing happened and she made everything up.

Id. at 5-6, 96. When Detective Paekukui asked Roman why she lied, Roman said that her husband had noticed she had bruise marks after returning from several of her weekends at the women's prison, and she told him she had been raped "to see what his reaction would be." *Id.* at 98. Roman said that, after initially telling her husband she had been raped, she had intended to inform him of the truth, but before she had a chance to do so her husband had called the police and therefore "she felt trapped" and "had to go on with her story." *Id.*

3(c). Detective Paekukui called Detective Fujinaka into the examination room, and Roman at that time said she "had lied and she was not raped." *Id.* at 122. Detective Fujinaka then asked Roman whether she "would be willing to write out a statement form to that effect," *id.*, and asked her to accompany him to another room to have her write down her statement. *Id.* at 6, 14, 122. Detective Fujinaka then left the second room, where Roman began to write her statement, to confer with his superior, Lieutenant James Neely. Roman was not placed under arrest. Rather, Detective Paekukui informed Roman, before she left the room where the polygraph examination had been held, only that "there's a possibility that she could be arrested for making false complaints." *Id.* at 108. While

Detective Fujinaka conferred with Lieutenant Neely, Roman wrote out incriminating statements on an HPD standard form 252.[1]

3(d). After receiving Detective Fujinaka's oral report Lieutenant Neely instructed Fujinaka to arrest Roman and charge her with false reporting. Neely also instructed Fujinaka to tape record a confession from Roman. Detective Fujinaka returned to the room where Roman was writing her statement. *Id.* at 6, 15. Detective Fujinaka produced a tape recorder and told Roman to read her statement into the tape recorder. After doing so,

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[1] The substance of Roman's HPD 252 form reads as follows:

> I was never raped at the women's correctional center by Brian Dona or Nick Paea on 10/31/86, 11/7/86, 12/19/86, 12/26/86, 12/27/86 + 1/2/87.
>
> When my husband picked me up at WCCC on 1/3/87, I had asked him what he would do if I had been raped by a guard. He said "nothing" so I said I had been, thinking I would tell him the truth when we got home. Before I had a chance to explain, he had drug [sic] the police into it and friends. [B]efore long there was no way out. I tried to tell him that I needed to talked [sic] to him but he always had somebody with him. I kept telling him that I didn't want to report it but he said that I had to.
>
> He had called my parents without consulting me first and there was no way out.
>
> I picked Brian & Nick[']s name because they were the first ones that came to mind.

Pet. App. at 67. HPD Form 252, although not containing the full *Miranda* warnings or their equivalent, contains an attestation that the statement is "freely and voluntarily" given "without coercion or promise of reward." *See id.* at 67-68.

Roman and Fujinaka both signed the statement. *Id.* at 20. During this period, but after Roman finished writing her statement, Fujinaka informed Roman that she "would be placed under arrest." *Id.* at 131. Fifteen minutes after signing the statement, Roman was formally placed under arrest for violating Haw. Rev. Stat. § 710-1015. Pet. App. 20. A complaint charging Roman with violating § 710-1015 was filed in the Circuit Court of the State of Hawaii on February 19, 1987. *State v. Roman,* Cr. No. 87-0178, Pet. App. 49.

4. At a suppression hearing, Roman moved to have excluded all of "the statements elicited from her on January 15, 1987 by Officers Paekukui and Fujinaka, on the grounds that those statements were elicited in violation of her State and Federal Constitutional rights." *Id.* at 50-51. Over lengthy objections by the State, including, *inter alia,* that "Defendant was not in custodial interrogation and therefore, *Miranda* rights were not required," and that Roman, by reason of the two forms signed at the commencement of questioning, "*was* sufficiently warned of her *Miranda* rights," *id.* at 73, 74 (emphasis in original), the trial court ordered all the statements suppressed. *Id.* at 20-22.

4(a). The circuit court reasoned, as to the "in-custody" issue, that, "[a]lthough the Defendant came to the police station voluntarily in order to submit to the polygraph examination, when Detective Paekukui began questioning Defendant after the polygraph examination ended, the Defendant became the subject of a custodial interrogation *since at that point she became the central focus of a separate criminal investigation.*" *Id.* at 21 (emphasis added). The circuit court rejected the State's contention that the original warnings, in any case, rendered the statements admissible. Despite the fact that those warnings informed Roman of her rights: (1) "to remain silent"; (2) not "to say anything to me or answer any of my questions"; (3) "to counsel of your choice or to talk to anyone else you want to"; (4) "to have an attorney present while I talk to you"; (5) to a court-appointed attorney "[i]f you cannot afford an attorney" and (6) "to stop answering at anytime" even "[i]f you decide to answer my questions without a lawyer being present," and stated (7) "[a]ny statement you make may be used in court," the court found the warnings ineffective on two grounds. First, the court asserted that "while the form indicated that the Defendant's words might be used in court, the form did not indicate that those words might be used against her." *Id.* at 20. Second, the court also asserted that, despite the express and unqualified warnings concerning "[a]ny statement," and "any questions," and the unqualified right to "have an attorney present while I talk to you," the court found an implied limit in Roman's assent to questioning during the instrument phase of the examination. Although "the form indicated that the Defendant would be informed of the results of the polygraph test," the court held that the form "said nothing about any interrogation of the Defendant about those results," and was insufficient to sustain any of the post-"focus" inculpatory statements. *Id.*

4(b). On appeal, the Supreme Court of Hawaii affirmed, rejecting the State's contention that Roman was not in custody when she confessed, Pet. App. 37-41, and, if she were, *Miranda* warnings given at the outset of the interview were adequate as to at least some of her incriminating statements, *id.* at 42-48. Relying upon its original interpretation of this Court's decisions in *Beckwith v. United States,* 425 U.S. 341 (1976), and *Oregon v. Mathiason,* 429 U.S. 492 (1977),[2] the Supreme Court of Hawaii held that, as soon as Detective Paekukui "encouraged [Roman] to tell the truth," Roman was "in custody" as "[t]he criminal investigation had now focused on Roman, and the questioning by Det. Paekukui (and later Det. Fujinaka) became specific as to her misconduct." Pet. App. 11 (citing *State v. Blanding,* 69 Haw. ___, 752 P.2d 99 (1988)). Purporting to distinguish this Court's decisions in *Wyrick v. Fields,* 459 U.S. 42 (1982), and *Colorado v. Spring,* 479 U.S. 564 (1987), as well as its own decision interpreting them, *see State v. Ramones,* 69 Haw. ___, 744 P.2d 514 (1987), the Supreme Court of Hawaii asserted that the *Miranda* warnings originally given to Roman were inadequate because Roman was not, when she was read the warnings, "a suspect knowing about being the focus of an investigation and the chance of criminal liability." Pet. App. at 13. Absent "rewarnings specifically pertaining to the subsequent interrogation," the Court held, *Miranda* was violated. *Id.* Because "[t]he first improper questioning by Det. Paekukui therefore tainted all of Roman's subsequent confessions," *id.*, the court upheld the suppression order in its entirety.

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[2] *See State v. Blanding,* 69 Haw. ___, 752 P.2d 99, 101 (1988) (*quoting State v. Melemai,* 64 Haw. 479, 481, 643 P.2d 541, 544 (1982) (*citing, e.g., State v. Patterson,* 59 Haw. 357, 361, 581 P.2d 752, 755 (1978) (*citing, in turn, e.g., Beckwith v. United States,* 425 U.S. 341 (1976), *Oregon v. Mathiason,* 429 U.S. 492 (1977), and *Hancock v. Estelle,* 558 F.2d 786 (5th Cir. 1976)))).

REASONS FOR GRANTING THE WRIT

The factors motivating the certiorari jurisdiction are forcefully present in this case. Permitted to stand, the Supreme Court of Hawaii's published decision will have permanent, adverse, and perhaps, dangerous effects on the ability of courts throughout Hawaii to admit probative evidence gathered pursuant to *Miranda v. Arizona,* 384 U.S. 346 (1966), and precepts "settled clearly by past decisions of this Court." *California v. Beheler,* 463 U.S. 1121,1122 (1983) (per curiam).

A. The Lower Court's Ruling that Respondent Was "In Custody" Because Police "Focused" on Her Own Criminal Conduct Is Fundamentally at Odds With This Court's Decisions.

In ruling that *Miranda* warnings were required prior to *all* of Roman's four[3] confessions, the Supreme Court of Hawaii relied exclusively upon the notion, also adopted by the state circuit court, that *Miranda's* requirements are triggered simply by the fact that a suspect becomes " 'the central focus of a separate criminal investigation.' " Pet. App. 13. Because, starting with the post-instrument testing by Detective Paekukui, "[t]he criminal investigation had now focussed on Roman, and the questioning by Det. Paekukui (and later Det. Fujinaka) became specific as to her misconduct," "a relatively innocuous interview had turned into a custodial interrogation requiring *Miranda* warnings." *Id.* at 11. These rulings compellingly warrant review.

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[3] The four different confessions that may be separated out for *Miranda* analysis are: (1) Roman's post-instrument oral remarks to Detective Paekukui, in which she initially confessed to filing a false report; (2) Roman's oral remarks made in the presence of Detectives Paekukui and Fujinaka; (3) Roman's written statement, made prior to the time Detective Fujinaka informed her she "would" be placed under arrest; and (4) Roman's endorsement of the written statement and tape recorded reading of the statement in the presence of Detective Fujinaka.

The Supreme Court of Hawaii's exposition of the "in-custody" trigger for *Miranda* warnings constitutes a radical expansion of *Miranda* and defies with no fewer than three specific decisions of this Court,[4] each of which unequivocally refute, the latter two summarily, "that the 'in custody' requirement was satisfied merely because the police interviewed a person who was the 'focus' of a criminal investigation." *California v. Beheler,* 463 U.S. 1121, 1124 n.2 (1983) (per curiam). The Supreme Court of Hawaii's "focus" test not only eviscerates this precedent, and the law of arrest generally, *see, e.g., Michigan v. Chesternutt,* 108 S. Ct. 1975, 1979 (1988) (citing cases), but gravely impairs the legitimate questioning *Miranda* does not purport to limit. *See, e.g., Oregon v. Elstad,* 470 U.S. 298, 305 (1985).

Nothing could be more abhorrent to the "simplicity and clarity of the holding in *Miranda,*" *Berkemer v. McCarty,* 468 U.S. 420, 432 (1984), than the inherently subjective "focus" test employed here. As this Court reaffirmed only recently, "[t]he Court in *Miranda* 'presumed that interrogation in *certain custodial* circumstances is inherently coercive. . . .' " *Duckworth v. Eagan*, 57 U.S.L.W. 4942, 4943 (U.S. June 26, 1989)(emphasis added). Nothing in this Court's decisions suggests the *Miranda* analytic may be reversed by subjecting "certain [non]-custodial circumstances" to *Miranda's* strictures. *Cf. Pennsylvania v. Bruder*, 109 S. Ct. 205, 206 (1988) (per curiam). The "focus-of-investigation" test endorsed below does just that.

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[4] *California v. Beheler,* 463 U.S. 1121 (1983) (per curiam); *Oregon v. Mathiason,* 429 U.S. 492 (1977); *Beckwith v. United States,* 425 U.S. 341 (1976).

In reversing state courts in analogous circumstances, this Court has repeatedly affirmed that, " '[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been *taken into custody* or otherwise *deprived of his freedom in any significant way*.' " *California v. Beheler*, 463 U.S. at 1123 (quoting *Miranda v. Arizona*, 384 U.S. at 444 (emphasis added)). Here, as in *Beheler*, and the cases on which it relies, Roman, at least prior to the time she was told she "would be" placed under arrest, was neither "taken into custody" nor "deprived of h[er] freedom in any significant way." As this Court held in *Beheler*, the fact that Roman may have been "unaware of the consequences of h[er] participation" in the post-instrument questioning, *see* 463 U.S. at 1125 n.3, is irrelevant.

Although, unlike in *Beheler*, Roman was placed under arrest at the station house, the circuit court, sitting as trier of fact, ruled that Roman's arrest did not occur until "[f]ifteen minutes after signing the written statement." Pet. App. 20. The Supreme Court of Hawaii did not in any way disturb this finding, and ruled that, at the appellate stage, the relevant facts, as stated by the circuit court, were "not disputed." Pet. App. 5. Given this record, the patently incorrect reading of the in-custody requirement is before this Court. Respondent persistently argued her "focus" theory as the basis for excluding all of her post-instrument statements, *see* Pet. App. 57-58, and, in these circumstances the practice of this Court is to "deal with the case as it came here and affirm or reverse based on the ground relied upon below." *Peralta v. Heights Medical Center, Inc.*, 108 S. Ct. 896, 899 (1988); *see also First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 312 n.5 (1987); *United Stated v. Leon*, 468 U.S. 897, 905 (1984).[5] Because there is no tenable basis for upholding the analysis below of the "in-custody" issue, the Court should grant the writ.

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[5] The reasons why this Court ought not delve beyond the broad reasoning of the Supreme Court of Hawaii are particularly compelling, when, as here, the trial court's implied conclusion, endorsed by the Supreme Court of Hawaii, that Roman was free to leave prior to her arrest, or at least prior to the time when she was informed she "would be arrested," turned on respondent's waiver of credibility issues surrounding her claim that, after Detective Paekukui confronted respondent, she said she "wanted to go home." *See* Pet. App. at 140, 156 ("I don't think the Court needs to find that Mrs. Roman did say that"); *see also* Pet. App. at 110-11, 114-15 (Det. Paekukui's denial of Roman's alleged request to "go home"); *id.* at 164 (court's finding of "no deliberate effort to subvert Defendant's rights"). Indeed, Respondent expressly conceded in the Supreme Court of Hawaii that, at the time of her initial incriminating statements to Detective Paekukui, she "was not yet under formal arrest," and rested her legal argument on the "in-custody" issue entirely upon the conclusion that, at the time of the post-instrument testing, "the 'focus of the investigation' was upon Mrs. ROMAN[.]" *See* Appellee's Ans. Br. at 13, No. 12986 (Haw. filed Nov. 2, 1988). Under these circumstances, it is plain this Court would not affirm on alternative grounds, because such grounds were not "presented below." *See Hankerson v. North Carolina*, 432 U.S. 233, 240 n.6 (1977).

B. The Ruling that Respondent was Entitled to New Miranda Warnings Conflicts with this Court's Decisions, Including the Recent Decision in *Duckworth v. Eagan*, No. 88-317.

The Hawaii court's erroneous "focus" analysis infected not only the court's treatment of the "in-custody" issue, but caused a second major error. Setting itself against repeated holdings that *Miranda* does not " 'require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights,' " *Colorado v. Spring,* 479 U.S. 564, 576-77 (1987), the Hawaii Supreme Court discounted the *Miranda* warnings given in this case because Roman, when *Miranda* warnings were initially given at the start of the polygraph process, was not "a suspect knowing about being the focus of an investigation." Pet. App. 13. Assuming Roman had to be given warnings before all four confessions, the court below gravely erred in finding "rewarnings specifically pertaining to the subsequent interrogation were mandated." *Id.*

This Court has established that here "[t]he inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda.*' " *Duckworth v. Eagan,* 57 U.S.L.W. at 4944. The warnings here met this test. The warnings were replete with references to questioning beyond the agreed-upon polygraph questions. The warnings referred to Roman's rights not "to say *anything* to *me* or answer *any* of *my* questions." Pet. App. 65, 80. They called Roman's attention to the fact that "*any* statement you make may be used in court." *Id.* The subject matter of the interview was broadly defined as "sexual assualt" at the "Womans Facility," and the warnings expressly referred to Roman's "right to have an attorney present while I talk to you" at a time *other* than "while the polygraph examination [on agreed questions] is being conducted." *Id.*

Recognizing that this Court has explicitly held that it is "unreasonable . . . to assume that [one who consents to a polygraph examination] would not be informed of the polygraph readings and asked to explain any unfavorable results," *Wyrick v. Fields,* 459 U.S. 42, 47 (1982) (per curiam), the Supreme Court of Hawaii purported to distinguish this case on the basis that Roman was not "a suspect knowing about being the focus of an investigation and the chance of criminal liability." Pet. App. 13. But this distinction has absolutely no basis in logic, or precedent. The very reading of the *Miranda* rights to a polygraph witness places her on notice that the State's interests are potentially adverse. Permitted to stand, the Supreme Court of Hawaii's decision effectively engrafts upon *Miranda* a requirement that police must warn suspects of the specifics of the state's criminal laws. Nothing in any of this Court's *Miranda* decisions remotely supports such a result. As the Court held in *Colorado v. Spring,* 479 U.S. 564 (1987), *Miranda* "required that the police inform a criminal suspect that he has the right to remain silent and that *anything* he says may be used against him." *Id.* at 577. *Miranda* does not require the added warning that one subject to questioning "is" a suspect.

Although an alternative argument, that the warning, "[a]ny statement you make may be used in court," Pet. App. 65, 80, was inadequate because it did not state expressly that any statement Mrs. Roman might make might be used "against" her, was accepted by the state trial court, the suppression order could not be upheld on this ground in light of the Court's recent decision in *Duckworth v. Eagan*, 57 U.S.L.W. 4942 (U.S. June 26, 1989).

The "any statement you make" warning, like the "if and when you go to court" language at issue in *Duckworth*, was given as part of a larger set of "warnings," and, as *Duckworth* requires, must be viewed in context. Although the words "against you" were omitted from the warnings to Mrs. Roman, here, as in *Duckworth*, other language in the warnings conveyed the substance of what *Miranda* requires. For example, the warning that these are "your rights," "you have a right to remain silent," "don't have to say anything to me or answer any of my questions," and "have a right to have an attorney present while I talk to you," fully convey that what one is waiving is a right not to make uncounseled statements that might be used "against" oneself "in court." Any other reading makes the warnings, taken as a whole, senseless. As *Duckworth* stresses, "[r]eviewing courts . . . need not examine *Miranda* warnings as if construing a will or defining the terms of an easement." 57 U.S.L.W. at 4944.

However viewed, the warnings "touched all of the bases required by *Miranda*," *Duckworth*, 57 U.S.L.W. at 4944, and should have been sustained. Certiorari should issue to correct the lower courts' substantial departure from this Court's decisions.

C. The Decision Below is Not Supported by An Independent and Adequate State Ground and is Reviewable Here.

In seeking review here, the State of Hawaii is aware of, and indeed, subscribes to, the view that this Court does not have jurisdiction over a state court decision that "rests on an adequate and independent state ground." *Michigan v. Long,* 463 U.S. 1010, 1032 (1983) (per curiam). Since *Long,* however, this Court has held that dismissal is not required unless the ruling under review embodies "a 'plain statement' of the court's reliance on an alternative state-law holding." *Quinn v. Millsap,* 57 U.S.L.W. 4686, 4688 n.6 (U.S. June 15, 1989). No such statement is present. Here, the Supreme Court of Hawaii did not even cite the Hawaii Constitution. Pet. App. 1-13.

Both the in-custody and sufficiency-of-warning issues rest upon determinations of federal law as defined in *Long* and its progeny. Indeed, the Hawaii court's analysis of the in-custody question, on close scrutiny, traces to the Hawaii court's decision in *State v. Patterson,* 59 Haw. 357, 361, 581 P.2d 752, 755 (1978), which analyzed this Court's decisions in *Beckwith v. United States,* 425 U.S. 341 (1976), and *Oregon v. Mathiason,* 429 U.S. 492 (1977), as well as related authority from the federal courts of appeals, *e.g., Hancock v. Estelle,* 558 F.2d 786 (5th Cir. 1976), in detail. *Patterson* became the basis for the Supreme Court of Hawaii's language in *State v. Melemai,* 64 Haw. 479, 481, 643 P.2d 541, 544 (1982), which, along with *State v. Blanding,* 69 Haw. ___, 752 P.2d 99 (1988), another case relying on *Melemai* (and *Patterson*), were construed to generate the basis for the in-custody rulings here. *See* Pet. App. 11. The Supreme Court of Hawaii cited expressly to this Court's decision in *Miranda v. Arizona,* 384 U.S. 436 (1966), *see* Pet. App. 4, and it thus "fairly appears" that, at the least, the state decision is "interwoven with the federal law." *Long,* 463 U.S. at 1040. *See also Maryland v. Garrison,* 480 U.S. 79, 83 (1987).

This conclusion applies as well to the sufficiency-of-warning issue. Here, the Supreme Court of Hawaii sought to distinguish its decision from *Colorado v. Spring,* 479 U.S. 564 (1987), and *Wyrick v. Fields,* 459 U.S. 42 (1982), as well from its decision in *State v. Ramones,* 69 Haw. ___, 744 P.2d 514 (1987), which interpreted *Spring. See* Pet. App. at 13. The court's citation to *State v. Nelson,* 69 Haw. ___, 748 P.2d 365 (1987), does not alter this analysis, because *Nelson* itself, albeit conclusorily citing the Hawaii Constitution, relied on *Ramones.* In any case, at the very least the Supreme Court of Hawaii's opinion suggests that, on this front, the Hawaii constitutional provision "is construed *in pari materia* with the [Fifth] Amendment." *Maryland v. Garrison,* 480 U.S. 79, 83-84 (1987). That is sufficient to require this Court to accept jurisdiction here.

In cases analogous to that here this Court has accepted jurisdiction over objections that the state court applied "state standards." *California v. Beheler,* 463 U.S. 1121, 1123 n.1 (1983) (per curiam). There is no obstacle to correction of the state court's disturbing expansion of the *Miranda* doctrine.

◆

CONCLUSION

Because the decision below is not supported by an adequate and independent state ground, raises important and substantial federal questions, and decides them "in a way in conflict with applicable decisions of this Court," S. Ct. R. 17.1(c), this Court should grant certiorari, and summarily reverse the Supreme Court of Hawaii, or set the matter for full briefing and argument. Because the Supreme Court of Hawaii did not have the benefit of *Duckworth v. Eagan*, No. 88-317 (U.S. June 26, 1989), at the time that it ruled, and because *Duckworth* was handed down long after the time in which to petition for rehearing expired in the court below, the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of the precepts stated recently in *Duckworth v. Eagan*.[6]

Respectfully submitted, July 10, 1989.

KEITH M. KANESHIRO *Prosecuting Attorney* *City and County of Honolulu*	WARREN PRICE, III* *Attorney General* *State of Hawaii*
WALLACE W. WEATHERWAX* *Deputy Prosecuting Attorney* *City and County of Honolulu*	STEVEN S. MICHAELS *Deputy Attorney General* *State of Hawaii*

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Counsel for Petitioner

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[6] Both as a general matter, *see Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979), and because *Duckworth* reaffirms the "in-custody" principle of *Miranda*, Petitioner understands that a remand of the type sought by our alternative prayer would permit us to persuade the Supreme Court of Hawaii to alter its judgment upon either of the two grounds that are raised here.

APPENDIX A
IN THE SUPREME COURT OF THE STATE OF HAWAII

◆

STATE OF HAWAII, Plaintiff-Appellant,

vs.

HAILA DIANE ROMAN, Defendant-Appellee.

NO. 12986

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

HONORABLE WILFRED K. WATANABE, JUDGE
HONORABLE DANIEL G. HEELY, JUDGE
HONORABLE MARIE N. MILKS, JUDGE
HONORABLE DONALD K. TSUKIYAMA, JUDGE
HONORABLE ROBERT WON BAE CHANG, JUDGE

(CRIMINAL NO. 87-0178)

APRIL 11, 1989

LUM, C.J., NAKAMURA, PADGETT, HAYASHI, AND WAKATSUKI, JJ.

CRIMINAL LAW – evidence – admissions, declarations, and hearsay – declarations by accused – in general – admissibility in general.

SAME – same – same – same – same – accusatory stage of proceedings.

SAME – same – same – same – right to counsel; caution – informing accused as to his rights.

> ***Miranda* warnings must precede any police questioning which subjugates an individual to the will of the examiner and thereby undermines the privilege against self-incrimination.**

SAME – same – same – same – voluntary character of statement – interrogation and investigatory questioning.

SAME – same – same – same – right to counsel; caution – accusatory stage of proceedings.

The test to determine if a custodial interrogation had taken place is whether the investigating officer should have known that his or her words or conduct were reasonably likely to evoke an incriminating response.

SAME – same – same – same – voluntary character of statement – interrogation and investigatory questioning.

SAME – same – same – same – right to counsel; caution – informing accused as to his rights.

We do not condone any police ignorance about the law and the consequences of a custodial interrogation.

SAME – same – same – same – right to counsel; caution – accusatory stage of proceedings.

SAME – same – same – same – same – informing accused as to his rights.

Miranda warnings must clearly convey to the accused a full understanding of the applicable constitutional protections: the right to remain silent, that anything said can and will be used against the accused, the right to an attorney present during the questioning, plus an appointed counsel will be offered if needed.

SAME – same – same – same – right to counsel; caution – failure to request counsel; waiver.

SAME – same – same – same – in general – circumstances affecting admissibility in general.

That the defendant read and signed police forms providing *Miranda* warnings prior to confessing may be sufficient to indicate a valid waiver of one's constitutional rights, but the defendant's age, background, intelligence, and situation should be considered.

SAME – same – same – same – right to counsel; caution – informing accused as to his rights.

SAME – same – same – same – same – failure to request counsel; waiver.

SAME – same – materiality and competency in general – compelling accused to criminate himself – in general.

Because the accused was not informed about the totally separate false charges problem (although arising out of the inquiry into her rape complaint), the earlier Miranda warnings (relating solely to the polygraph examination) were inadequate, so rewarnings specifically pertaining to the subsequent interrogation were mandated.

SAME – same – admissions, declarations, and hearsay – declarations by accused – right to counsel; caution – failure to request counsel; waiver.

SAME – same – same – same – voluntary character of statement – interrogation and investigatory questioning.

Where the prosecution has not proven that the accused was properly admonished about her constitutional rights, there could be no valid waiver.

OPINION OF THE COURT BY HAYASHI, J.

Plaintiff-Appellant State of Hawaii (hereinafter "State") appeals the order suppressing the confessions made by Defendant-Appellee Haila Diane Roman (hereinafter "Roman"). After using a polygraph examination to verify rape charges filed by Roman, the investigating police officers had suspected that she was lying, questioned her about the accusations without first giving *Miranda v. Arizona,* 384 U.S. 436 (1966) warnings (hereinafter "*Miranda* warnings"), and then obtained oral plus written confessions admitting to fabricating the allegations. The trial court had ruled that the police had improperly interviewed Roman after the polygraph session by failing to issue the required *Miranda* warnings. State contends that the trial court erred because 1) there was no custodial interrogation necessitating *Miranda* warnings; and 2) Roman had received adequate *Miranda* warnings prior to the polygraph testing. We disagree, instead affirm the suppression order, and therefore remand the case for further proceedings.

I.

BACKGROUND FACTS.

The facts are not disputed. On January 5, 1987, Roman, an inmate serving weekends at the Women's Correctional Facility reported having been repeatedly raped by two male Adult Corrections Officers on November 7, 1986, December 9, 1986, December 26, 1986, December 27, 1986 and January 2, 1987. But the investigating Honolulu Police Department (hereinafter "HPD") Detective Leighton Fujinaka (hereinafter "Det. Fujinaka") suspected Roman was lying (based on the inconsistencies in her story plus the lack of corroborating physical evidence) and arranged a polygraph examination to confirm her charges.

On January 15, 1987 at the Beretania Street police station, qualified examiner HPD Detective John Paekukui (hereinafter "Det. Paekukui") went over two standard police forms apprising Roman of her Fifth and Sixth Amendment rights, seeking consent to the polygraph testing, plus telling that the test results would be discussed afterwards. Roman signed the forms. After the questioning had ended, Det. Paekukui reviewed the readings for a few minutes, determined that Roman had not been truthful describing the purported rapes, and confronted her.

As Det. Paekukui later testified at the hearing on the motion to suppress:

> Q. When you informed Ms. Roman that you concluded that she was not being entirely truthful with you, what response did she give, if any?

> A. At first, she said that she was telling the whole truth and at that point, she wouldn't make any other statements that she was just telling the truth about what had happened, continued to talk to her about this result of the test, and when I told her that *it appeared that she was carrying a heavy burden because of this test, and that if she would tell the truth, it would probably make her feel better* instead of feeling this burden. That's when she asked me to sit down because she wanted to tell me something. This is when she told me that she lied in the test and nothing happened and she made everything up [to allay her husband's suspicions about unexplained bruises received while at the prison].

Transcript of July 10, 1987 1 at 18 (emphasis added).[1]

Det. Paekukui next brought Det. Fujinaka into the examination room where Roman repeated her confession. Det. Fujinaka thereafter took Roman to another room to have her write down her statement and informed his superior officer HPD Lieutenant James Neely (hereinafter "Lt. Neely"). Lt. Neely then instructed Det. Fujinaka to arrest Roman for making false accusations plus tape record her confession.

On February 19, 1987, Roman was charged with violating Hawaii Revised Statutes § 710-1015 (1985) by filing a false crime report.[2] On June 15, 1987, the defense moved to suppress all of Roman's confessions arguing that 1) she had been improperly pressured into talking; 2) no *Miranda* warnings had issued after the questioning, based on the polygraph examination results, had commenced; and 3) the warnings on the two standard police forms had failed to alert Roman about any post-testing interrogation. State answered that 1) Roman was not under custodial interrogation but had voluntarily confessed; 2) the two police forms had adequately explained her *Miranda* rights; plus 3) no unlawful coercion had occurred.

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[1] There are two transcripts numbered 5340 for the July 10, 1987 suppression motion hearing. The morning session containing Det. Paekukui's testimony will be designated as "1." The afternoon session describing the accounts of Det. Fujinaka plus Roman will be referred to as "2."

Det. Fujinaka subsequently testified as follows:

> Q During the time Ms. Roman was *in your custody,* Detective, did you ever inform her of her constitutional rights?
>
> A No, I did not.
>
> Q Why not?
>
> A After she had made a spontaneous utterance to me and the polygraph in the presence of Detective Paekukui and myself and after getting her permission to write out her statement on the statement form, my intention was just to close the case for

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[2] The statute provides:

§ 710-1015 False reporting to law-enforcement authorities. (1) A person commits the offense of false reporting to law-enforcement authorities if he intentionally makes a report or causes the transmission of a report to law-enforcement authorities relating to a crime or other incident within their concern when he knows that the information contained in the report is false.

(2) False reporting to law-enforcement authorities is a misdemeanor.

insufficient evidence, because of the deception that was discovered. However, I did inform her in the polygraph room, if I recall correctly, that she may be arrested for making a false report. At that point *I had no indication or intention of placing her under arrest*. Basically, mainly to close the report, while she was writing out her statement form in the interview room I went to look for my lieutenant [Lt. Neely]. I left her alone to inform him of the progress of this particular case. I was unable to locate him at that time. I then returned back to the room. She had just about finished the statement form. I left her again. I found the lieutenant. I informed the lieutenant what had happened. And it was at that point the lieutenant instructed me to place her under arrest for making a false report and also to tape record her written statement.

. . . .

Q What about when Detective Neely told you to arrest her? At that point you intended to arrest her.

A Well, when Lieutenant Neely informed me to arrest her, *at that point I should have warned her of her constitutional rights. But I did not.*

Transcript of July 10, 1987 2 at 8-9, 16 (emphasis added).

On April 19, 1988, the trial court rendered its written decision suppressing Roman's statements by concluding that:

> 1. As a matter of law, the "WARNING PERSONS TAKING A POLYGRAPH EXAMINATION OF THEIR CONSTITUTIONAL RIGHTS" given to the Defendant before the polygraph examination was insufficient to enable her to knowingly and intelligently waive her rights with regard to the post-test interrogation by Detective Paekukui. *Nothing in the language of the written warning of rights form given to the Defendant explicitly related to interrogation after the polygraph examination.* Furthermore, while the form

> indicated that the Defendant's words might be used in court, *the form did not indicate that those words might be used against her.* In addition, while the form indicated that the Defendant would be informed of the results of the polygraph test, *it said nothing about any interrogation of the Defendant about those results.* Consequently, the Defendant could not have knowingly and intelligently waived her rights with regard to the post-polygraph interrogation.

Record at 87-88 (emphasis added). The trial court therefore held that a custodial interrogation had begun when Roman became the focus of a false charges investigation, the police detectives had improperly failed to give *Miranda* warnings after the polygraph examination, and the official misconduct had tainted all the statements which had to be suppressed.

State then appealed.

II.

QUESTIONS PRESENTED.

We will answer the issues as follows:

1. Whether the trial court erred by ruling that a custodial interrogation requiring *Miranda* warnings had taken place? NO.

2. Whether the trial court erred by holding that Roman had not been adequately apprised of her constitutional rights by the two standard police forms? NO.

III.

CUSTODIAL INTERROGATION.

State maintains that Roman did not undergo any custodial interrogation since the questioning concerned her rape accusations and not her involvement in any other crime, she was free to leave after receiving the polygraph examination results, plus the police detectives did not attempt to incriminate her. Roman counters that the inherently coercive, intimidating situation forced her to admit to the fabrication and amounted to custodial interrogation.

Miranda warnings must precede any police questioning which subjugates an individual to the will of the examiner and thereby undermines the privilege against self-incrimination. *State v. Russo,* 67 Haw. 126, 681 P.2d 553 (1984), *appeal after remand,* 69 Haw. ___, 734 P.2d 156 (1987). The test to determine if a custodial interrogation had taken place is whether the investigating officer should have known that his or her words or conduct were reasonably likely to evoke an incriminating response. *State v. Ikaika,* 67 Haw. 563, 698 P.2d 281 (1985).

Here, Roman voluntarily underwent the polygraph testing, was not at first a suspect, so was not initially in custody. *State v. Sugimoto,* 62 Haw. 259, 614 P.2d 386 (1980); *see also State v. Wyatt,* 67 Haw. 293, 687 P.2d 544 (1984). Yet, Det. Paekukui knew about Det. Fujinaka's suspicions, confirmed that Roman had probably lied about the rape incidents, and then encouraged her to tell the truth (i.e. confess to concocting a false story). State does not challenge the trial court's crucial finding that:

> 12. When Det. Paekukui informed the Defendant of his conclusion, the Defendant initially insisted that she had told the truth about the sexual assaults. Det. Paekukui then questioned the Defendant about the discrepancies between the polygraph test and her statements for about five minutes. At one point Det. Paekukui observed that the Defendant appeared to be carrying a "heavy burden"; *he urged her to unburden herself to him.* The Defendant then said, "Sit down, there's something I want to tell you." The Defendant then made a statement to Det. Paekukui that she had earlier fabricated her reports of being sexually assaulted while a prisoner at the Womens Facility.

Record at 85-86 (emphasis added).

The criminal investigation had now focussed on Roman, and the questioning by Det. Paekukui (and later Det. Fujinaka) became specific as to her misconduct. *See State v. Blanding,* 69 Haw. ___, 752 P.2d 99 (1988). What had originally been a relatively innocuous interview had turned into a custodial interrogation requiring *Miranda* warnings. *See State v. Amorin,* 61 Haw. 356, 604 P.2d 45 (1979).

State, however, declares that 1) neither Det. Paekukui nor Det. Fujinaka had sought to institute any charges based on Roman's admissions (until Lt. Neely's later intervention); 2) the questioning was not designed to elicit any incriminating evidence; so 3) *Miranda* warnings were unnecessary. *See State v. Paahana,* 66 Haw. 499, 666 P.2d 592 (1983).

But regardless of their initial, actual, subjective intent, the police detectives should have realized that they were essentially asking Roman to confess to the false reporting offense. *See State v. Melemai,* 64 Haw. 479, 643

P.2d 541 (1982). That a subsequent decision by Lt. Neely changed the situation should not excuse the police detectives' initial failure to give *Miranda* warnings. We do not condone any police ignorance about the law and the consequences of a custodial interrogation. *See e.g., State v. Uganiza*, 68 Haw. ___, 702 P.2d 1352 (1985).

IV.

THE POLICE FORMS' MIRANDA WARNINGS.

State next advances that 1) the two standard police forms which Roman had signed before submitting to the polygraph test provided sufficient *Miranda* warnings; so 2) she had willingly waived her constitutional rights by confessing. Roman replies that 1) the police forms were inadequate; and 2) there was no knowing, intelligent relinquishment of her *Miranda* rights.

Miranda warnings must clearly convey to the accused a full understanding of the applicable constitutional protections: the right to remain silent, that anything said can and will be used against the accused, the right to an attorney present during the questioning, plus an appointed counsel will be offered if needed. *State v. Hong*, 62 Haw. 83, 611 P.2d 595 (1980) (per curiam); *State v. Kalai*, 56 Haw. 366, 537 P.2d 8 (1975). That the defendant read and signed police forms providing *Miranda* warnings prior to confessing may be sufficient to indicate a valid waiver of one's constitutional rights, but the defendant's age. background, intelligence, and situation should be considered. *State v. Kreps*, 4 Haw. App. 72, 661 P.2d 711 (1983); *see State v. Maluia*, 56 Haw. 428, 539 P.2d 1200 (1975).

As the trial court accurately discerned, the forms revealed nothing about a post-testing interrogation leading to a criminal prosecution arising out of an offense other than the alleged rapes. *Cf. Wyrick v. Fields*, 459 U.S. 42 (1982) (per curiam). This is not an instance where the person under the police questioning was a suspect knowing about being the focus of an investigation and the chance of criminal liability. *See State v. Ramones*, 69 Haw. ___, 744 P.2d 514 (1987); *cf. Colorado v. Spring*, 479 U.S. 564 (1987). Because Roman was not informed about the totally separate false charges problem (although arising out of the inquire into her rape complaint), the earlier *Miranda* warnings (relating solely to the polygraph examination) were inadequate, so rewarnings specifically pertaining to the subsequent interrogation were mandated. *See State v. Nelson*, 69 Haw. ___, 748 P.2d 365 (1987).

Where the prosecution has not proven that the accused was properly admonished about her constitutional rights, there could be no valid waiver. *See State v. Kaahanui*, 69 Haw. ___, 747 P.2d 1276 (1987). The first improper questioning by Det. Paekukui therefore tainted all of Roman's subsequent confessions, rendering them inadmissible. *See State v. Kim*, 68 Haw. ___, 711 P.2d 1291 (1985).

We agree with the trial court's reasoning that:

> 2. Although the Defendant came to the police station voluntarily in order to submit to the polygraph examination, when Detective Paekukui began questioning the Defendant after the polygraph examination ended, the Defendant became the subject of a custodial interrogation since at that point she became the central focus of a separate criminal investigation.

3. *Because the Defendant was not re-informed of her Constitutional rights prior to the post-polygraph custodial interrogation, and because the earlier warning and waiver of rights were insufficient with regard to the post-polygraph interrogation,* the State of Hawaii could not demonstrate that it had exercised adequate procedural safeguards to secure the Defendant's privilege against self-incrimination. Consequently, the Defendant's oral statements to Detectives Paekukui and Fujinaka must be suppressed.

4. The Defendant's subsequent written statement must also be suppressed under the "cat out of the bag" doctrine articulated in *United States v. Bayer,* 331 U.S. 532, 540-541[, *reh'g denied,* 332 U.S. 785] (1947), and *State v. Medeiros,* 4 Haw. App. 248[, 665 P.2d 181] (1983) since the Defendant was not re-informed of her Constitutional rights against self-incrimination prior to making the written statement.

Record at 88 (emphasis added).

V.

CONCLUSION.

Accordingly based on the above analysis, we affirm the suppression order and remand the case for further proceedings consistent with this opinion.

Wallace W. Weatherwax (Lila B. LeDuc on the briefs), Deputies of the Prosecuting Attorney, for Plaintiff-Appellant	/s/ H. Lum /s/ Edward Nakamura /s/ Frank Padgett
Anthony K. Bartholomew (Brook Hart with him on the brief; Hart & Wolff, of counsel), for Defendant-Appellee	/s/ Yoshimi Hayashi /s/ J. Wakatsuki

APPENDIX B

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT STATE OF HAWAII

STATE OF HAWAII vs. HAILA DIANE ROMAN, Defendant.	CR. NO. 87-0178 FALSE REPORTING TO LAW ENFORCEMENT AUTHORITIES (§ 710-1015, H.R.S.) Police Report No. S-94064 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REGARDING DEFENDANT'S MOTION TO SUPPRESS ORAL AND WRITTEN STATEMENTS

[Filed April 19, 1988]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REGARDING DEFENDANT'S MOTION TO SUPPRESS ORAL AND WRITTEN STATEMENTS

THE DEFENDANT Haila Diane Roman having filed a Motion To Suppress Oral and Written Statements in the above-mentioned case, and that motion having come on for hearing before the Honorable Wilfred K. Watanabe on July 10, 1987, and having considered the moving papers and memoranda of the parties, the testimony of the witnesses and the arguments of counsel, and being fully advised in the premises, the court makes the following findings of fact and conclusions of law, and enters the following order.

Findings of Fact

1. On January 5, 1987, Mrs. Haila Roman (hereinafter referred to as "Defendant") reported to the police that she had been raped on six different occasions while serving a prison sentence at the Womens Correctional Facility. The Defendant's sentence required her to serve weekends at the Facility over a six month period, beginning in October 1986. The Defendant alleged that she had been assaulted by two prison guards on a series of weekends during her prison sentence, with the most recent alleged assault having occurred on January 2, 1987.

2. An immediate police investigation was instigated following the Defendant's report, directed by Detective Leighton Fujinaka of the CID Section of the Honolulu Police Department.

3. During his investigation of the Defendant's allegations, Detective Fujinaka interviewed twenty-three witnesses, examined and photographed the scene at the Correctional Facility where the rapes allegedly occurred, gathered physical evidence, and reconstructed the rape scenes with the Defendant. In addition, a "telephone contact" system was organized by Det. Fujinaka during the Defendant's subsequent weekend prison terms so that the Defendant could be immediately removed from the Corrections Facility if an additional rape incident occurred. However, no additional assault incidents were reported by the Defendant.

4. A prompt medical examination of the Defendant failed to disclose any evidence of physical assault consistent with rape or any medical evidence of rape.

5. During the course of his investigation, Det. Fujinaka discovered discrepancies in the Defendant's various descriptions of the separate rape incidents she had reported. Thinking that the Defendant was perhaps lying about having been raped, Det. Fujinaka decided to give the Defendant a polygraph test to confirm the truthfulness of her allegations.

6. Pursuant to Det. Fujinaka's decision, the Defendant was asked to take a polygraph test at the main station of the Honolulu Police Department at 1455 South Beretania Street. She agreed to do so.

7. After two postponements to accommodate the schedule of the Defendant, the polygraph test was administered on January 15, 1987 by HPD Detective John Paekukui, a qualified and experienced police polygrapher, whose police duties had consisted solely of polygraph examinations for the proceeding four years.

8. Detective John Paekukui had assisted Det. Fujinaka in his investigation of the Defendant's reported assaults, and was aware of Detective Fujunaka's suspicions that the Defendant was not telling the truth about being repeatedly raped.

9. Before conducting the polygraph examination of the Defendant, Det. Paekukui discussed the test with the Defendant, talking with her about the questions which he intended to use, and the manner in which the test would be given. In addition, Detective Paekukui warned the Defendant of her Constitutional rights, and presented her with a printed form entitled "WARNING PERSONS TAKING A POLYGRAPH EXAMINATION OF THEIR CONSTITUTIONAL RIGHTS." Near the top of the form was a

sentence reading "I am going to ask you questions about [SEXUAL ASSAULT] which occurred on or about [JAN. 2, 1987] at [WOMENS FACILITY]," with the sections in brackets having been filled by hand in ink in the preprinted form. Below that language was a recitation of the Defendant's Constitutional rights, including a warning that "Any statement you make may be used in court." The Defendant signed the form, attesting that she understood her rights as they were explained by Detective Paekukui.

10. Detective Paekukui also presented the Defendant with a pre-printed form entitled "PERSONAL DATA OF SUBJECT." The upper portion of the form was filled in with biographical information about the Defendant; the lower portion of the form was occupied by a section entitled "WAIVER," which stated, among other things, that the person taking the polygraph understood that "the results will be given to me at the end of the examination." The form was signed by the Defendant. Detective Paekukui also emphasized to the Defendant that she should tell the truth during the polygraph test.

11. The Defendant's responses during the polygraph test indicated to Det. Paekukui that the Defendant was not being truthful about having allegedly been raped. Following the test, Det. Paekukui reviewed the polygraph examination charts for a couple of minutes; he then informed the Defendant of his conclusion that she had not been telling the truth during the test.

12. When Det. Paekukui informed the Defendant of his conclusion, the Defendant initially insisted that she had told the truth about the sexual assaults. Det.

Paekukui then questioned the Defendant about the discrepancies between the polygraph test and her statements for about five minutes. At one point Det. Paekukui observed that the Defendant appeared to be carrying a "heavy burden"; he urged her to unburden herself to him. The Defendant then said: "Sit down, There's something I want to tell you." The Defendant then made a statement to Det. Paekukui that she had earlier fabricated her reports of being sexually assaulted while a prisoner at the Womens Facility.

13. Det. Paekukui brought Detective Fujinaka to the polygraph room. Det. Paekukui told the Defendant to tell Det. Fujinaka what she had said to Paekukui. The Defendant then repeated to Det. Fujinaka her earlier comments to Det. Paekukui. Before she was instructed to tell Det. Fujinaka what she had earlier told Paekukui, the Defendant was not informed of her right to remain silent.

14. Det. Fujinaka then took the Defendant to a different interrogation room. He instructed the Defendant write down what she had told the two detectives. To that end, the Defendant was provided with blank HPD-252 forms and began to write out her statement.

15. While the Defendant was writing her statement, Det. Fujinaka informed his superior officer, Lt. James Neely, about the Defendant's admission. After receiving Det. Fuijinaka's report, Lt. Neely instructed Fujinaka to arrest the Defendant and charge her with false Reporting To Law Enforcement Authorities. Neely also instructed Fujinaka to make a tape recording of the Defendant's statement.

16. Det. Fujinaka returned to the room where the Defendant was writing her statement. He produced a tape recorder and instructed the Defendant to read her statement aloud so that it could be tape recorded. After the statement was read into the tape recorder, it was signed by both the Defendant and Det. Fujinaka. At no time was the Defendant informed of her right to remain silent by Det. Fujinaka.

17. Fifteen minutes after signing the written statement, the Defendant was placed under arrest by Det. Fujinaka for False Reporting to Law Enforcement Authorities, a violation of § 710-1015, *H.R.S.*

Conclusions of Law

1. As a matter of law, the "WARNING PERSONS TAKING A POLYGRAPH EXAMINATION OF THEIR CONSTITUTIONAL RIGHTS" given to the Defendant before the polygraph examination was insufficient to enable her to knowingly and intelligently waive her rights with regard to the post-test interrogation by Detective Paekukui. Nothing in the language of the written warning of rights form given to the Defendant explicitly related to interrogation after the polygraph examination. Furthermore, while the form indicated that the Defendant's words might be used in court, the form did not indicate that those words might be used against her. In addition, while the form indicated that the Defendant would be informed of the results of the polygraph test, it said nothing about any interrogation of the Defendant about those results. Consequently, the Defendant could

not have knowingly and intelligently waived her rights with regard to the post-polygraph interrogation.

2. Although the Defendant came to the police station voluntarily in order to submit to the polygraph examination, when Detective Paekukui began questioning the Defendant after the polygraph examination ended, the Defendant became the subject of a custodial interrogation since at that point she became the central focus of a separate criminal investigation.

3. Because the Defendant was not re-informed of her Constitutional rights prior to the post-polygraph custodial interrogation, and because the earlier warning and waiver of rights were insufficient with regard to the post-polygraph interrogation, the State of Hawaii could not demonstrate that it had exercised adequate procedural safeguards to secure the defendant's privilege against self-incrimination. Consequently, the Defendant's oral statements to Detectives Paekukui and Fujinaka must be suppressed.

4. The Defendant's subsequent written statement must also be suppressed under the "cat out of the bag" doctrine articulated in *United States v. Bayer,* 331 U.S. 532, 540-541 (1947), and *State v. Mederios,* 4 Haw.App. 248 (1983) since the Defendant was not re-informed of her Constitutional rights against self-incrimination prior to making the written statement.

Order

WHEREFORE, for all of the reasons noted above, IT IS HEREBY ORDERED that the Defendant's Motion To Suppress Oral and Written Statements SHALL BE and the same is HEREBY GRANTED.

/s/ W.K. Watanabe
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

ANTHONY K. BARTHOLONEW
Counsel for the Defendant Haila Diane Roman

APPENDIX C

NO. 12986

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1988

STATE OF HAWAII, Plaintiff-Appellant, v. HAILA DIANE ROMAN, Defendant-Appellee.	CRIMINAL NO. 87-0178 APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REGARDING DEFENDANT'S MOTION TO SUPPRESS ORAL AND WRITTEN STATEMENTS FILED ON APRIL 19, 1988 FIRST CIRCUIT COURT HONORABLE WILFRED K. WATANABE HONORABLE DANIEL G. HEELY HONORABLE MARIE N. MILKS HONORABLE DONALD K. TSUKIYAMA HONORABLE ROBERT WON BAE CHANG JUDGES

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Supreme Court of the State of Hawaii, filed on April 11, 1989, the suppression order of the lower court is affirmed and the case remanded for further proceedings consistent with this opinion.

Dated at Honolulu, Hawaii: APR 25 1989.

BY THE COURT:

/s/ Sandra N. Yasui
Clerk

APPROVED:

/s/ Yoshimi Hayashi
Justice

(SEAL)

APPENDIX C

NO. 12986

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1987

STATE OF HAWAII, Plaintiff-Appellant, v. HAILA DIANE ROMAN, Defendant-Appellee.	CRIMINAL NO. 87-0178 APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REGARDING DEFENDANT'S MOTION TO SUPPRESS ORAL AND WRITTEN STATEMENTS FILED ON APRIL 19, 1988 FIRST CIRCUIT COURT HONORABLE WILFRED K. WATANABE HONORABLE DANIEL G. HEELY HONORABLE MARIE N. MILKS HONORABLE DONALD K. TSUKIYAMA HONORABLE ROBERT WON BAE CHANG JUDGES

[Filed August 4, 1988]

OPENING BRIEF OF THE STATE OF HAWAII

I.

STATEMENT OF JURISDICTION

This is an appeal by the State of Hawaii (hereinafter "State"), pursuant to Section 641-13(7), *Hawaii Revised*

Statutes, and Rules 3 and 4, *Hawaii Rules of Appellate Procedure,* from the "Findings of Fact, Conclusions of Law, and Order Regarding Defendant's Motion to Suppress Oral and Written Statements" filed April 19, 1988 by the Honorable Wilfred K. Watanabe. R.A. at 82-89.[1]

Notice of Appeal was timely filed from the April 19 order, on April 21, 1988. R.A. 90-98. The appeal was duly docketed on May 31, 1988, and a Supplemental Record on Appeal was filed June 24, 1988. This brief is timely filed pursuant to a motion and order for extension filed June 23, 1988 in the Hawaii Supreme Court, extending the deadline to August 8, 1988. The Hawaii Supreme Court and the Intermediate Court of Appeals have jurisdiction to hear this appeal pursuant to Sections 602-5 and 602-57, *H.R.S.*

Defendant-Appellee Haila Diane Roman (hereinafter "Defendant") stands charged in the First Circuit Court of the State of Hawaii, on a complaint for False Reporting to Law Enforcement Authorities, in violation of Section 710-1015, *H.R.S.;* She is free on cash bail posted in the amount of $50.00. R.A. 1-3.[2]

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[1] A copy of the "Findings of Fact, Conclusions of Law, and Order Regarding Defendant's Motion to Suppress Oral and Written Statements" is attached hereto as Appendix A. For reasons unknown, Judge Watanabe did not file his order until April 19, 1988, although the suppression motion was heard and orally granted on July 10, 1987. 7/10/87 p.m. Tr. 49:1-50:18.

[2] The case was committed to the Circuit Court on February 2, 1987, following Defendant's demand for jury trial on the misdemeanor complaint. R.A. 1-2. The complaint was amended by order filed April 30, 1987, to correct Defendant's name and the date of offense. R.A. 11-18.

II.

STATEMENT OF THE CASE

On June 15, 1987, Defendant filed in the First Circuit Court, State of Hawaii, a motion to suppress statements, predicated upon the federal and state constitutions. R.A. 23. The statements at issue were made to police after Defendant was advised that her polygraph examination showed deception; They consisted of the following:

(1) an oral statement to H.P.D. polygraph examiner Detective Paekukui, and then to Detective Fujinaka, that she had lied about being raped by 2 males ACOs during weekend detention at the women's facility, and the reason that she lied;

(2) a subsequent written statement on an H.P.D.-252 form with case Detective Fujinaka, essentially repeating what she had just told Paekukui; and

(3) a taped statement with Fujinaka, going over the H.P.D.-252. R.A. 25-27; 33-35 and 37-39.

In the moving papers, Defendant maintained that Miranda rights were required for the post-polygraph "interrogation," and that the waiver of rights signed in connection with her sexual assault report, did not extend to questioning/statements regarding the false reporting case (Defendant having switched positions from complainant to defendant). R.A. 32.

In an opposing memorandum, the State maintained that (1) Defendant was not subjected to custodial interrogation and Miranda warnings were not required, until probable cause had developed on the crime of false reporting, and (2) that the Miranda warnings given were sufficient. R.A. 62-68.

The motion came on for hearing before Judge Wilfred K. Watanabe on July 10, 1987. The evidence adduced on preliminary matters was aptly summarized in the court's findings of fact nos. 1-10, R.A. 83-85, as follows:

> *Findings of Fact*
>
> 1. On January 5, 1987, Mrs. Haila Roman (hereinafter referred to as "Defendant") reported to the police that she had been raped on six different occasions while serving a prison sentence at the Womens Correctional Facility. The Defendant's sentence required her to serve weekends at the Facility over a six month period, beginning in October 1986. The Defendant alleged that she had been assaulted by two prison guards on a series of weekends during her prison sentence, with the most recent alleged assault having occurred on January 2, 1987.
>
> 2. An immediate police investigation was instigated following the Defendant's report, directed by Detective Leighton Fujinaka of the CID Section of the Honolulu Police Department.
>
> 3. During his investigation of the Defendant's allegations, Detective Fujinaka interviewed twenty-three witnesses, examined and photographed the scene at the Correctional Facility where the rapes allegedly occurred, gathered physical evidence, and reconstructed the rape scenes with the Defendant. In addition, a "telephone contact" system was organized by Det. Fujinaka during the Defendant's subsequent weekend prison terms so that the Defendant could be immediately removed from the Corrections Facility if an additional rape incident occurred. However, no additional assault incidents were reported by the Defendant.

4. A prompt medical examination of the Defendant failed to disclose any evidence of physical assault consistent with rape or any medical evidence of rape.

5. During the course of his investigation, Det. Fujinaka discovered discrepancies in the Defendant's various descriptions of the separate rape incidents she had reported. Thinking that the Defendant was perhaps lying about having been raped, Det. Fujinaka decided to give the Defendant a polygraph test to confirm the truthfulness of her allegations.

6. Pursuant to Det. Fujinaka's decision, the Defendant was asked to take a polygraph test at the main station of the Honolulu Police Department at 1455 South Beretania Street. She agreed to do so.

7. After two postponements to accomodate the schedule of the Defendant, the polygraph test was administered on January 15, 1987 by HPD Detective John Paekukui, a qualified and experienced police polygrapher, whose police duties had consisted solely of polygraph examinations for the preceding four years.

8. Detective John Paekukui had assisted Det. Fujinaka in his investigation of the Defendant's reported assaults, and was aware of Detective Fujinaka's suspicions that the Defendant was not telling the truth about being repeatedly raped.

9. Before conducting the polygraph examination of the Defendant, Det. Paekukui discussed the test with the Defendant, talking with her about the questions which he intended to use, and the manner in which the test would be given. In addition, Detective Paekukui warned the Defendant of her Constitutional rights, and presented her with a printed form entitled "WARNING PERSONS TAKING A POLYGRAPH EXAMINATION OF THEIR CONSTITUTIONAL RIGHTS." Near the top of the form was a sentence reading "I am going to ask you questions

about [SEXUAL ASSAULT] which occurred on or about [JAN. 2, 1987] at [WOMENS FACILITY]," with the sections in brackets having been filled by hand in ink in the pre-printed form. Below that language was a recitation of the Defendant's Constitutional rights, including a warning that "Any statement you make may be used in court." The Defendant signed the form, attesting that she understood her rights as they were explained by Detective Paekukui.

10. Detective Paekukui also presented the Defendant with a pre-printed form entitled "PERSONAL DATA OF SUBJECT." The upper portion of the form was filled in with biographical information about the Defendant; the lower portion of the form was occupied by a section entitled "WAIVER," which stated, among other things, that the person taking the polygraph understood that "the results will be given to me at the end of the examination." The form was signed by the Defendant. Detective Paekukui also emphasized to the Defendant that she should tell the truth during the polygraph test.[3]

Additionally, Detective Paekukui testified that *prior* to Defendant's signing the rights and waiver forms, he had discussed with her that the test can detect deception, a.m. Tr. 31:11-13, and that she would be informed of the results, Tr. 18:25-19-4 (although he did not tell her of his intention to question her in the event she failed the test, Tr. 29:16-23).

The polygraph examination was conducted between 2:45 p.m. and 4:00 p.m. a.m. Tr. 16:14-18. After the test, the detective reviewed the charts a few minutes and then informed Defendant that the results showed that she was not being completely truthful. a.m. Tr. 16:19-17:4; 18:20-24. Within five minutes of learning the results, a.m. Tr. 18:25-19:4, Defendant admitted to him that she had been lying:

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[3] The pre-printed forms referred to in paragraphs 9 and 10 were received into evidence at the hearing (State's Exhibits 1 and 2) 7/10/87 a.m. Tr. 12:9-18; A true copy of each is attached hereto as Appendices B and C, respectively. The exhibits are located in the Record on Appeal at 77-81.

> A. At first, she said that she was telling the whole truth and at that point, she wouldn't make any other statements that she was just telling the truth about what had happened, continued to talk to her about this result of the test, and when I told her that it appeared that she was carrying a heavy burden because of this test, and that if she would tell the truth, it would probably make her feel better instead of feeling this burden. That's when she asked me to sit down because she wanted to tell me something. This is when she told me that she lied in the test and nothing happened and she made everything up.
>
> * * *
>
> A. She was very calm and to me, appears she was relieved from all this pressure of lying to her husband.[4]
>
> Q. Did you do anything to coerce Ms. Roman into telling you that she lied?
>
> A. No, sir.
>
> Q. Did you raise your voice at any time before she changed her story?
>
> A. No.

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[4] Defendant had voluntarily explained to Paekukui that she made up the idea of being raped to see what her husband's reaction would be, and when he then reported it to the police, she felt compelled to stick with her story. a.m. Tr. 19:13-20:19.

Q. Did you threaten her in any way?

A. No, sir.

a.m. Tr. 18:5-18; 21:1-11.

In her testimony at the motion hearing, Defendant claimed that Paekukui coerced her into saying that she was lying, by his prolonged and intimidating questioning. p.m. Tr. 24:11-26:21. She further related:

> A I felt that by telling him I was lying and dropping the charges that they would leave me alone [at the women's prison.] The week prior to that they put me in so-called protective custody. That was a nightmare. I didn't want to go through that again. So I figured I would just stop everything.

p.m. Tr. 27:10-14. She also testified that she went to the stationhouse accompanied by her husband and her mother, p.m. Tr. 20:3-21, and understood that statements she made during the polygraph examination could be used against her in court. Tr. 22:21-24.

Following the retraction of her rape complaint, Defendant provided several statements to case Detective Fujinaka and was arrested for false reporting.[5] These events were summarized in the lower court's findings of fact nos. 13-17, R.A. 86-87, as follows:

> 13. Det. Paekukui brought Detective Fujinaka to the polygraph room. Det. Paekukui told the Defendant to tell Det. Fujinaka what she had said to

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[5] The State concedes that after Defendant retracted her story with Detective Paekukui, there was probable cause to arrest her for false reporting, and that her subsequent statements to case Detective Fujinaka would require Miranda warnings.

Paekukui. The Defendant then repeated to Det. Fujinaka her earlier comments to Det. Paekukui. Before she was instructed to tell Det. Fujinaka what she had earlier told Paekukui, the Defendant was not informed of her right to remain silent.

14. Det. Fujinaka then took the Defendant to a different interrogation room. He instructed the Defendant write down what she had told the two detectives. To that end, the Defendant was provided with Blank H.P.D.-252 forms and began to write out her statement.

15. While the Defendant was writing her statement, Det. Fujinaka informed his superior officer, Lt. James Neely, about the Defendant's admission. After receiving Det. Fujinaka's report, Lt. Neely instructed Fujinaka to arrest the Defendant and charge her with False Reporting To Law Enforcement Authorities. Neely also instructed Fujinaka to make a tape recording of the Defendant's statement.

16. Det. Fujinaka returned to the room where the Defendant was writing her statement. He produced a tape recorder and instructed the Defendant to read her statement aloud so that it could be taped recorded. After the statement was read into the tape recorder, it was signed by both the Defendant and Det. Fujinaka. At no time was the Defendant informed of her right to remain silent by Det. Fujinaka.

17. Fifteen minutes after signing the written statement, the Defendant was placed under arrest by Det. Fujinaka for False Reporting to Law Enforcement Authorities, a violation of §710-1015, *H.R.S.*

III.

STATEMENT OF POINTS OF ERROR RELIED UPON

1. Finding of Fact No. 13, R.A. 86 (underscored portion only):

> 13. Det. Paekukui brought Detective Fujinaka to the polygraph room. Det. Paekukui told the Defendant to tell Det. Fujinaka what she had said to Paekukui. The Defendant then repeated to Det. Fujinaka her earlier comments to Det. Paekukui. *Before she was instructed to tell Det. Fujinaka what she had earlier told Paekukui, the Defendant was not informed of her right to remain silent.*

Prior to any police questioning, Defendant was indeed informed of her right to remain silent. She admitted in her testimony that she went over the waiver of rights form, State's Exhibit 1 (App. B hereto) with Detective Paekukui. p.m. Tr. 21:9-17, and there was no dispute that she was presented with the form and signed it. The court also found that "Paekukui warned the Defendant of her Constitutional Rights." Finding of fact no. 9, R.A. 84. See, also, WAIVER portion of Exhibit 2 (Appendix C hereto).

To the extent that finding of fact no. 13 was intended to mean that Defendant was not specifically re-warned when Fujinaka came into the room, the State would agree.

2. Conclusion of Law No. 1, R.A. 87-88:

> 1. As a matter of law, the "WARNING PERSONS TAKING A POLYGRAPH EXAMINATION OF THEIR CONSTITUTIONAL RIGHTS" given to the Defendant before the polygraph examination was insufficient to enable her to knowingly and intelligently waive her rights with regard to the post-test interrogation by Detective Paekukui. Nothing in the language of the written warning of rights form given to the Defendant explicitly related to interrogation after the polygraph examination. Furthermore, while the form indicated that the Defendant's words might be used in court, the form did not indicate that those

> words might be used against her. In addition, while the form indicated that the Defendant would be informed of the results of the polygraph test, it said nothing about any interrogation of the Defendant about those results. Consequently, the Defendant could not have knowingly and intelligently waived her rights with regard to the post-polygraph interrogation.

The court erred in holding that the Defendant did not knowingly and intelligently waive her rights. The valid waiver was evidenced by State's Exhibits 1 and 2 (Appendices B and C hereto), as well as her own testimony that she understood that statements made during the examination could be used against her in court. p.m. Tr. 22:21-24. There was no constitutional requirement that the Defendant be specifically informed re: post-test questions, and the distinction in this case is an artificial one, i.e., the questions arose out of, and directly concerned, the sex abuse reports.

3. Conclusion of Law No. 2, R.A. 88:

> 2. Although the Defendant came to the police station voluntarily in order to submit to the polygraph examination, when Detective Paekukui began questioning the Defendant after the polygraph examination ended, the Defendant became the subject of a custodial interrogation since at that point she became the central focus of a separate criminal investigation.

The court erred in concluding that Defendant became a suspect in a separate crime at the point that the post polygraph questioning began. At that juncture, the police knew only that Defendant's answers were deceptive, but they did not know why. Defendant may have failed the test for any number of reasons, and there was simply no probable cause to believe that she had fabricated the entire story until she admitted doing exactly that.

Additionally, Defendant was not in custody, and clearly could not have been taken into custody, until police became aware of the false reporting crime through her own admissions.

Thus, Defendant's initial confession to Paekukui was not a product of custodial interrogation requiring Miranda Warnings.

4. Conclusion of Law No. 3, R.A. 88:

> Because the Defendant was not re-informed of her Constitutional rights prior to the post-polygraph custodial interrogation, and because the earlier warning and waiver of rights were insufficient with regard to the post-polygraph interrogation, the State of Hawaii could not demonstrate that it had exercised adequate procedural safeguards to secure the Defendant's privilege against self-incrimination. Consequently, the Defendant's oral statements to Detectives Paekukui and Fujinaka must be suppressed.

The State reasserts and incorporates by reference its position on the above points of error nos. 1–3, *i.e.*, (1) Defendant's initial oral statement to Paekukui was not a product of custodial interrogation and (2) even if Miranda was required for all statements, the warnings were sufficient and Defendant intelligently and knowingly waived her rights before voluntarily giving her statements to the detectives. Police were not required to reinform Defendant of her constitutional rights. *See, generally, State v. Ramones,* 69 Haw. ___, ___ 744 P.2d 514, 518 (1987); *Colorado v. Spring,* 479 U.S. ___, 93 L.Ed.2d 954 (1987)

5. Conclusion of Law No. 4, R.A. 88:

> 4. The Defendant's subsequent written statement must also be suppressed under the "cat out of the bag" doctrine articulated in *United States v. Bayer,* 331 U.S. 532, 540-541 (1947), and *State v. Medeiros,* 4 Haw. App. 248 (1983) since the Defendant was not re-informed of her Constitutional rights against self-incrimination prior to making the written statement.

Because police had already obtained a valid waiver of Miranda rights, they were not required to re-inform the Defendant of her rights, and the "cat out of the bag" doctrine is inapplicable.

IV.

STANDARD OF REVIEW

The lower court's legal conclusions are reviewable *de novo,* for error. *State v. Ramones, supra,* 69 Haw. at ___, 744 P.2d at 516.

"Finding of Fact" no. 13 is reviewable under the clearly erroneous standard.

V.

QUESTION PRESENTED FOR REVIEW

WHETHER THE LOWER COURT SHOULD HAVE SUPPRESSED DEFENDANT'S STATEMENTS

VI.

ARGUMENT

A. DEFENDANT'S INITIAL CONFESSION TO THE POLYGRAPH EXAMINER WAS NOT A PRODUCT OF CUSTODIAL INTERROGATION REQUIRING MIRANDA WARNINGS.

Custodial questioning has been defined as "queston-ing initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *State v. Melemai*, 64 Haw. 479, 481, 643 P.2d 541, 544 (1982), citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

In the case at bar, while the lower court made no specific fact findings as to whether Defendant was "free to leave" after receiving the test results, the court held in Conclusion of Law No. 2, RA 88, that when Paekukui began the post-examination questioning, "Defendant became the subject of a custodial interrogation since at that point she became the central focus of a separate criminal investigation." The State disagrees.

The evidence in the case showed that Defendant came to the police station with her mother and husband voluntarily to take the polygraph test as she was the alleged victim of sex abuse. She was not in "custodial interrogation" after the polygraph test was given, nor under arrest, nor under suspicion, and was free to leave.

Following the test, the police knew only that Defendant's answers were deceptive, but they did not know why. Defendant may have failed the test for any number of reasons, and there was no probable cause to believe that she had fabricated her entire story until she admitted doing exactly that. Defendant was not in custody, and clearly could not have been taken into custody, until police became aware of the false reporting crime through her own admissions.

Thus, Defendant's initial confession to Paekukui was not a product of custodial interrogation: The questioning still pertained to Defendant's sex assault complaint, Defendant was discussing the matter with police at her own volition, and she was not a suspect merely because her story contained inconsistencies. a.m. Tr. 7:1-14; 38:14-39:20.

Most significantly, Defendant's confession was elicited before she was taken into custody and before any investigation had focused on her. *See, generally, State v. Russo,* 67 Haw. 126, 681 P.2d 553 (1984) And, while the State recognizes that the subjective intent of the police to detain or interrogate, is not dispositive of the necessity for *Miranda* warnings, *New York v. Quarles,* 467 U.S. 649, 656, n. 6 (1984), on these facts, Defendant could not have held a reasonable belief that she was not free to go upon receiving the results of her polygraph examination. At that juncture, the police had no basis to detain her, and she remained there and discussed the rape charges with Paekukui of her own volition and to further her own interests.[6]

Nor was the Defendant subject to police questioning amounting to interrogation which undermined her privilege against self-incrimination. Here, as in *State v. Ikaika,* 67 Haw. 563, 698 P.2d 281 (1985); *State v. Paahana,* 66 Haw. 499, 666 P.2d 592 (1983) and *State v. Pahio,* 58 Haw. 323, 568 P.2d 1200 (1977), the statement did not ask for a response and it was unforseeable that defendant would suddenly reveal her secrets. Compare, *State v. Uganiza*, 68 Haw. ___, 702 P.2d 1352 (1985).[7]

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[6] In fact, even after the case detective learned of her confession, his only intent was to close the case for insufficient evidence, although he cautioned Defendant that she could be arrested for making a false report. p.m. Tr. 8:9-20.

With respect to police pressure or coercion, in this case it amounted to nothing more than the examiner's suggestion that Defendant unburden herself by killing the truth. This is insufficient to render her statement involuntary. *See, e.g., State v. Rook*, 283 S.E.2d 732 (N.C. 1981); ("[T]he only thing that could help him [defendant] was to tell the truth."); *Clark v. State*, 429 A.2d 287 (Md. App. 1981) ("[S]eeing what they could do for him."; "[I]t would be in his best interest to tell the real story."; "[H]elp in every way he could."); *People v. Jackson*, 618 P.2d 149 (Ca. 1980) ("[I]f you did, you are going to feel better if you tell us."); *People v. Dozier*, 385 N.E.2d 155 (Ill. App. 1979) ("[I]t would be in his favor, his benefit to tell the truth."); *People v. McGuire*, 234 N.E.2d 772 (Ill. 1968) ("[I]t would be better for the defendant if he confessed."); *People v. Hill*, 426 P.2d 908 (Ca. 1967) ("[H]elp himself [the defendant].") And although Defendant claimed that her confession resulted from "pressure from Paekukui," (affidavit of counsel, ¶ 2e at 2, R.A. 26) she admitted in her testimony that her decision to talk with Paekukui was based upon her assessment that by dropping the charges, life at prison would go easier for her. p.m. Tr. 27:10-14.

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[7] Although the court concluded in finding of fact no. 12, R.A. 86, that Paekukui "urged" Defendant to unburden herself "to him," his testimony was actually the following:

> A. At first, she said that she was telling the whole truth and at that point, she wouldn't make any other statements that she was just telling the truth about what had happened, continued to talk to her about this result of the test, *and when I told her that it appeared that she was carrying a heavy burden because of this test, and that if she would tell the truth, it would probably make her feel better instead of feeling this burden.* That's when she asked me to sit down because she wanted to tell me something. This is when she told me that she lied in the test and nothing happened and she made everything up.

a.m. Tr. 18:5-18; underscoring added.

Additionally, the confession should not be deemed coerced simply because it followed an announcement of the polygraph results. The use of a polygraph machine, or the announcement of polygraph results, prior to a confession, does not constitute coercion. *State v. Sanders,* 223 Kan. 273, 574 P.2d 559 (1977); *State v. Clifton,* 271 Or. 177, 531 P.2d 256 (1975). A confession made by a defendant in the course of a polygraph examination does not of itself render the confession inadmissible. *State v. Sanders, supra,* 574 P.2d at 563. It is admissible where it has been voluntarily made. *Id.; see also, People v. McHenry,* 104 Cal. App. 764 (1962); *State v. Green,* 271 Or. 153, 531 P.2d 245 (1975); *Greg v. State,* 404 N.E.2d 1348 (Ind. 1980); *Commonwealth v. Smith,* 83 A.2d 1113 (Pa. Super 1983). Thus, a number of courts have permitted the introduction of a confession, after the Defendant has been told of the adverse/deceptive results. *See, e.g., State v. Keiper,* 493 P.2d 750, 751 (Ore. App. 1972); *State v. Lerch,* 666 P.2d 840, 843 (Ore. App. 1983); *People v. Barretto,* 64 Cal. Rptr. 211 (Cal. App. 1967); *Commonwealth v. Hipple,* 3 A.2d 353 (Pa. App. 1939).

In sum, Defendant's initial confession to the polygraph examiner was not a product of custodial interrogation.

B. *THE DEFENDANT WAS SUFFICIENTLY APPRISED OF HER **MIRANDA** RIGHTS AND, KNOWINGLY AND INTELLIGENTLY WAIVED THEM.*

The trial court held that Defendant could not have knowingly and intelligently waived her rights, because

> . . . while [form entitled "WARNING PERSONS TAKING A POLYGRAPH EXAMINATION OF THEIR CONSTITUTIONAL RIGHTS"] the indicated that the Defendant's words might be used in court, the form did not indicate that those words might be used against her. In addition, while the form indicated that the Defendant would be informed of the results of the polygraph test, it said nothing about any interrogation of the Defendant about those results.

Conclusion of Law no. 1, R.A. 87.

* * *

> 3. Because the Defendant was not re-informed of her Constitutional rights prior to the post-polygraph custodial interrogation, and because the earlier warning and waiver of rights were insufficient with regard to the post-polygraph interrogation, the State of Hawaii could not demonstrate that it had exercised adequate procedural safeguards to secure the Defendant's privilege against self-incrimination.

Conclusions of Law no. 3, R.A. 88 (portion omitted).

However, the State's position is that the record demonstrates that Defendant was adequately apprised of her rights, and knowingly and intelligently waived them before she voluntarily provided her statements to police.

1. *The language of the warnings was constitutionally adequate, notwithstanding the phrase that "any statement you make may be used in court."*

Miranda warnings need not precisely track any particular litany, so long as the substance of the rights are adequately conveyed to the person being questioned. *California v. Prysock,* 451 U.S. 1301 (1981).

In the instant case, the two forms signed by Defendant, R.A. 77-81. Appendices A and B hereto, adequately informed Defendant of her rights; In addition, the record also discloses that:

(1) the "waiver" portion of the "Personal Data of Subject" form (Appendix B) acknowledged that Defendant understood her rights against self-incrimination;

(2) Defendant admitted in her testimony that she understood that anything she said could be used against her; and

(3) Defendant has never claimed that she was misled or misapprehended her rights, because of the deviation in language.

Given the totality of the circumstances, the warnings were constitutionally adequate.

While the State has not located any authorities involving language identical to that used in the instant case, it is instructive to note that several courts reviewing the phrase "for or against you," in substitution for "against you," have found the language adequate. *See, Anderson v. State,* 235 So.2d 902, 905 (Ala. Ap. 1969), [*cert. denied,* 235 So. 2d 906 (Ala. 1970)] and cases cited therein. Also instructive is the decision in *State v. Melvin,* 319 A.2d

450, 457 (S.Ct. N.J. 1974), wherein the court held with respect to "for or against" as follows:

> [4] It is misleading to tell a person in custody, as part of the *Miranda* warnings, that anything he says can be used for him in a court of law. This Court has disapproved such language in the past. Nevertheless, the oral warning here did constitute compliance with the literal requirements of *Miranda*.
>
> [5-7] In resolving the adequacy of the language of a *Miranda* warning a court should give precedence to substance over form. . . . Words which covey the substance of the warning along with the required information are sufficient." *See Evans v. Swenson,* 455 F.2d 291 (8th Cir. 1972). *See also State v. Haskins,* 278 N.C. 52, 178 S.E.2d 610 (Sup. Ct. 1971). The language used to convey the warnings to the defendant here did adequately inform him of the substance of his constitutional rights. While we take this occasion emphatically to voice our disapprobation of the deviations herein from the words of the *Miranda* opinion, we cannot say that under the circumstances of this case constitutional error was committed. We note that as in *Funicello, supra,* the disapproved language did not play a significant or prejudicial part in the production of the oral or written confessions. The defendant does not contend that he was misled into taking the polygraph test or into disclosing incriminating information in reliance upon the warning he was given.

Citations omitted.

Accordingly, the deviation in language in this case should not be grounds for suppression.

2. *The warnings were constitutionally adequate, notwithstanding the fact that they did not mention any post-test interrogation.*

In *Wyrick v. Fields,* 459 U.S. 42 (1982), the Court rejected the notion that a valid waiver of rights obtained at the commencement of a polygraph, did not extend to post-test questioning:

> Disconnecting the polygraph equipment effectuated no significant change in the character of the interrogation. The CID agent could have informed Fields during the examination that his answers indicated deceit; asking Fields, after the equipment was disconnected, why the answers were bothering him was not any more coercive . . . it would have been unreasonable for Fields and his attorneys to assume that Fields would not be informed of the polygraph readings and asked to explain any unfavorable result. Moreover, Fields had been informed that he could stop the questioning at any time, and could request at any time that his lawyer join him. Merely disconnecting the polygraph equipment could not remove this knowledge from Fields' mind . . . the questions put to Fields after the examination would not have caused him to forget the rights of which he had been advised and which he had understood moments before. [The contrary rule would be] an unjustifiable restriction on reasonable police questioning.

459 U.S. at 47-49.

In *Fields,* as in the instant case, Defendant was not apprised of post-test interrogation, but was told that the questioning could be stopped at will. Although *Fields* involved the waiver of the right to counsel, its holding is clearly applicable to the instant case. It seems settled, at least as a matter of federal law, that an advice of rights need not mention post-polygraph questioning of deceptive results, and that re-warning is not required following administration of the test. Accordingly, the advice of rights was sufficient, and Defendant's knowing and intelligent waiver thereof extended to all questioning, *i.e.*, police were not required to re-warn the Defendant of her rights, following receipt of the test result. *Wyrich v. Fields, supra.*

Equally instructive is the decision in *Colorado v. Spring*, 479 U.S. ___, 93 L.Ed.2d 954 (1987) wherein the Court held that a suspect's awareness of all possible subjects of interrogation is *not* relevant to the inquiry of whether the *Miranda* waiver was voluntary, knowing and intelligent.

In *Spring*, the defendant waived his rights with respect to a weapons charge, but was additionally questioned about a murder. He denied involvement in any murder, but admitted having shot someone. Defendant was re-interviewed two months later, while in jail on the weapons charge; this time he was specifically advised that he would be questioned about the murder, and confessed thereto after waiving his rights.

In holding that the second statement was admissible, 93 L.Ed.2d at 962, n. 2, the court opined:

> (1c] Once *Miranda* warnings are given, it is difficult to see how official silence could cause a suspect to misunderstand the nature of his constitutional right – "his right to refuse to answer any question which might incriminate him." *United States v. Washington*, 431 U.S. 181, 188, 52 L.Ed.2d 238, 97 S.Ct. 1814 (1977). "Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." Ibid. We have held that a valid waiver does not require that an individual be informed of all

> information "useful" in making his decision or all information that "might . . . affec[t] his decision to confess." *Moran v. Burbine,* 475 U.S. at ___, 89 L.Ed.2d 410, 106 S.Ct. 1135. "[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." Ibid. Here, the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature.

93 L.Ed. at 967. *See also State v. Ramones* (waiver not ineffective merely because defendant questioned for auto theft, but then charged for Unauthorized Control of Propelled Vehicle, which carried same penalty; thus, re-warning not required).

The only question remaining in this case is whether there is any significance to the fact that Defendant was a complaining witness, rather than a suspect, when police obtained the waiver of rights. On the basis of the rationales of the authorities discussed hereinabove, the State submiits that such factor is constitutionally irrelevant. Additionally, it is a non-issue, because the admission was directly linked to questioning regarding the rape complaints.

In the instant case, Detective Paekukui merely explained that Defendant's test showed deception; her confession followed shortly. The questioning by Detective Paekukui was a natural follow-up to the test itself, as was the confession itself. No new *Miranda* warnings were required. Similarly, when Detective Fujinaka was called into the polygraph room following Defendant's confession, it was merely for the purpose of having Defendant repeat her statement to Detective Fujinaka. Defendant's written statement and taped statement were only embodiments of what she had already told Detective Paekukui.

As discussed above, the extensive *Miranda* warnings given to Defendant were sufficient to apprise her of her rights, and her confession was not rendered inadmissible merely because she was not apprised of the possibility of a false complaint case, or because redundant warnings were not later administered. Accordingly, the "cat-out-of the bag" doctrine has no application here.

VII.

CONCLUSION

> [It] is consonant with good morals and the Constitution, to exploit a criminal's ignorance or stupidity in the detectional process. This must be so if Government is to succeed in its primary mission to protect the first right of the individual to live free from criminal attack.

State v. Green, 51 Haw. 260, 266, 457 P.2d 505, 509 (1969).

Based on the foregoing, the State requests this Court reverse the decision of the lower court, and permit the use of Defendant's statements at a trial herein.

Dated at Honolulu, Hawaii: August 4, 1988.

Respectfully submitted,
STATE OF HAWAII
By CHARLES F. MARSLAND, JR.
Prosecuting Attorney
By /s/ Lila B. LeDuc
Deputy Prosecuting Attorney
City and County of Honolulu

APPENDIX E

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT STATE OF HAWAII

STATE OF HAWAII	)	CR. NO. 87-0178
v.	)	FALSE REPORTING TO LAW ENFORCEMENT AUTHORITIES (§ 710-1015, H.R.S.)
HAILI DIANE ROMAN,	)	
Defendant.	)	
	)	COMPLAINT

[Filed Feb. 19, 1987]

COMPLAINT

The undersigned Deputy Prosecuting Attorney of the City and County of Honolulu, State of Hawaii charges:

On or about the 2d day of January, 1987, in the City and County of Honolulu, State of Hawaii, HAILI DIANE ROMAN did intentionally make a report or cause the transmission of a report to the Honolulu Police Department, a law enforcement authority, relating to crimes, within the concern of said Honolulu Police Department, when the said HAILI DIANE ROMAN knew that the information contained in the report was false, thereby committing the offense of False Reporting to Law Enforcement Authorities in violation of Section 710-1015 of the Hawaii Revised Statutes.

Dated at Honolulu, Hawaii: February 13, 1987.

STATE OF HAWAII

By CHARLES F. MARSLAND, JR.
Prosecuting Attorney
By /s/ Rodney H.K. Loo
Deputy Prosecuting Attorney
City and County of Honolulu

APPENDIX F

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT STATE OF HAWAII

STATE OF HAWAII vs. HAILA DIANE ROMAN, Defendant.	CR. NO. 87-0178 FALSE REPORTING TO LAW ENFORCEMENT AUTHORITIES (Section 710-1015, H.R.S.) MOTION TO SUPPRESS ORAL AND WRITTEN STATEMENTS; AFFIDAVIT OF ANTHONY K. BARTHOLOMEW; MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS ORAL AND WRITTEN STATEMENTS; EXHBITS A-D; NOTICE OF MOTION; CERTIFICATE OF SERVICE TRIAL WEEK: 7/20/87

[Filed June 15, 1987]

MOTION TO SUPPRESS ORAL AND WRITTEN STATEMENTS

Comes now Defendant Haila Diane ROMAN, by and through her undersigned attorneys, and moves this court for an order suppressing as evidence in this case certain oral and written statements attributed to Ms. ROMAN, which statements are specifically described in the attached affidavit of Anthony K. Bartholomew, on the ground that said statements were elicited from Ms.

ROMAN in violation of her rights under the Constitutions of the United States and the State of Hawaii.

This motion is filed pursuant to Rule 12 (b) of the *Hawaii Rules of Penal Procedure,* and is supported by the records and files herein, the affidavit of Anthony K. Bartholomew, memorandum of law and supporting exhibits attached hereto, and such other evidence and arguments as may be adduced at the hearing to be held upon this motion.

DATED: Honolulu, Hawaii, June 8, 1987.

/s/ Anthony K. Bartholomew
PETER C. WOLFF, JR.
ANTHONY K. BARTHOLOMEW
Attorneys for Defendant
Haila Diane Roman

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII) CR. NO. 87-0178
)
vs.) FALSE REPORTING TO
) LAW ENFORCEMENT
HAILA DIANE ROMAN,) AUTHORITIES (Section
) 710-1015, H.R.S.)
Defendant.)
) AFFIDAVIT OF
) ANTHONY K.
) BARTHOLOMEW

AFFIDAVIT OF ANTHONY K. BARTHOLOMEW

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

ANTHONY K. BARTHOLOMEW, being first duly sworn on oath, deposes and says:

1. I am one of the attorneys for Haila Diane ROMAN, Defendant in the above-named criminal case.

2. Ms. ROMAN is charged in this case with false reporting to law-enforcement authorities, in violation of H.R.S. Section 710-1015. The facts and circumstances relevant to the instant motion are as follows:

a. Ms. ROMAN was sentenced in a prior criminal case to serve weekends at the Women's Correctional Center between October 3, 1986 and March 17, 1987.

b. During her weekends of confinement at the Women's Correctional Center, Ms. ROMAN was sexually assaulted by two male guards on six separate occasions between October 3, 1986 and January 2, 1987. The last of those assaults occurred on January 2, 1987.

c. After the last assault on January 2, 1987, Ms. ROMAN informed her husband about what had been happening to her. Ms. ROMAN's husband reported the matter to the authorities, and on January 5, 1987, Ms. ROMAN made statements to the police naming the two guards who had assaulted her. The police opened a sexual assault case under report number V-34084. *See,* Exhibit A, attached hereto.

d. On January 15, 1987, Ms. ROMAN submitted to a polygraph examination conducted by HPD Officer Paekukui. Before taking the polygraph exam, Ms. ROMAN was advised of her right to refuse the test, as well as her right to remain silent. Ms. ROMAN was given a warning of rights form which she signed. *See,* Exhibit B, attached hereto.

e. After the examination was completed, Paekukui conducted a post-exam interrogation of Ms. ROMAN. The officer informed Ms. ROMAN that she had been found deceptive. At that point, Ms. ROMAN became convinced that the police did not and would not believe her. Ms. ROMAN had approximately three months left to serve on her sentence. Ms. ROMAN was frightened to return to the prison, where she would have no protection from the two guards. Under pressure from Paekukui, and in an effort to protect herself from the guards' retribution, Ms. ROMAN told Paekukui that she had not been raped by the two guards. *See,* Exhibit A, attached hereto.

f. Ms. ROMAN was then taken to a different interrogation room and questioned by Offcier Fujinaka. Officer Fujinaka did not warn her of her rights. Ms. ROMAN made a written statement to the effect of what she had told Officer Paekukui. *See* Exhibit C, attached hereto. Before Ms. ROMAN signed the statement, Officer Fujinaka was ordered by his superior to arrest her. Fujinaka again questioned Ms. ROMAN and had her sign her statement. Within fifteen minutes of signing that statement, Ms. ROMAN was arrested for false reporting. Exhibit D, attached hereto.

3. Ms. ROMAN now moves the court to suppress the statements elicited from her on January 15, 1987 by Officers Paekukui and Fujinaka, on the ground that those statements were elicited in violation of her State and Federal Constitutional rights. The reasons and arguments why the court should grant Ms. ROMAN's motion to suppress are fully presented in the attached memorandum of law.

FURTHER, Affiant sayeth naught.

/s/ Anthony K. Bartholomew
ANTHONY K. BARTHOLOMEW

Subscribed and sworn to before me this 8th day of June, 1987.

/s/ Cheryl Scheppe Lau
Notary Public, State of Hawaii

My commission expires: 12/7/90

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII	)	CR. NO. 87-0178
vs.	)	FALSE REPORTING TO LAW ENFORCEMENT AUTHORITIES (Section 710-1015, H.R.S.)
HAILA DIANE ROMAN, Defendant.	)	MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS ORAL AND WRITTEN STATEMENTS

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS ORAL AND WRITTEN STATEMENTS

The Fifth Amendment to the United States Constitution, and its parallel provision in the Hawaii Constitution, Article I, Section 10, provide in part that:

> No person shall . . . be compelled in any criminal case to be a witness against himself (oneself). . . .

In *State v. Russo*, 67 Haw. 126 (1984), the Hawaii Supreme Court considered the parameters of the right against self incrimination and stated:

> This keystone of "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the . . . expedient of compelling it from his own mouth." *Miranda v. Arizona*, 384 U.S. at 460. Recognizing that the demand can be fulfilled only when a person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will," *Malloy v. Hogan*, 378 U.S. 1, 8 (1966), the

> Supreme Court laid down a rule that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona,* 384 U.S. at 444.

67 Haw. at 131-132.

In *Russo* the defendant was questioned by the police about a shooting. At the time, the defendant was in his own home. When he argued on appeal that his statements made when he was questioned should have been suppressed, the State argued that the statements were not made during "custodial" interrogation. Regarding that issue, our Court stated:

> *Miranda* rights, as noted earlier, are triggered whenever "questioning [is] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona,* 384 U.S. at 444 (footnote omitted). Of course, the State does not deny the defendant was subjected to questioning; however, it claims the statements used against him were elicited before he was taken into custody. *Yet an arrest is hardly a "condition precedent" to interrogation, and questioning in a setting as familiar to the defendant as his residence may still be custodial in character.*

67 Haw. at 133-134 [citation omitted, emphasis added].

The Court went on to define interrogation giving rise to *Miranda* rights as "questioning of a nature that would subjugate the individual to the will of the examiner and thereby undermine the privilege against compulsory self-incrimination." 67 Haw. at 134 (citations omitted). In *State* *v. Paahana,* 66 Haw. 499 (1983), the Court described the relevant inquiry:

> In determining whether a defendant's statement was made in a custodial context, the totality of the circumstances must be considered, including the time, place and length of the interrogation, the nature of the questions asked, the conduct of the police at the time of the interrogation, and any other pertinent factors.

66. Haw. at 502-503.

Among the "other pertinent factors" considered important by the Court are "whether the investigation has focused on the suspect and whether the police have probable cause to arrest him prior to questioning." *Russo,* 67 Haw. at 134. Regarding those factors, our Court has stated:

> While focus of the investigation upon the defendant, standing alone, will not trigger the application of the *Miranda* rule, it is an important factor in determining whether the defendant was subjected to custodial interrogation. Probable cause to arrest is also not determinative, but it may play a significant role in the application of the *Miranda* rule.

State v. Melemai, 64 Haw. 479, 481 (1982) [citations omitted].

Ms. ROMAN asserts that when the facts of this case are examined in light of the principles set forth above, it is clear that her statements to Officers Paekukui and Fujinaka should be suppressed.

Ms. ROMAN *was* subjected to custodial interrogation on January 15, 1987. She was not in the familiar surroundings of her own residence, but rather in the inherently coercive setting of the police station. And while Ms. ROMAN had gone voluntarily to the station in order to take the polygraph examination, after the polygraph was completed and Ms. ROMAN was informed that she was found deceptive, her presence there was no longer voluntary.

After the polygraph exam was completed, there is no question that the "focus" of the investigation had shifted entirely from the two accused guards to Ms. ROMAN herself. And, as evidenced by the swiftness of its occurrence, the police had at that point probable cause for her arrest. Indeed, as reflected by Officer Fujinaka's report, he had already been instructed to arrest Ms. ROMAN *before* she signed the written statement. Exhibit D, attached hereto.

The State may be expected to argue that Ms. ROMAN was properly and fully advised of her rights before the polygraph examination, and that the pre-polygraph warnings were sufficient to demonstrate the "procedural safeguards" required by law. 67 Haw. at 132. Ms. ROMAN asserts that the pre-test warnings were insufficient to protect her rights.

When Ms. ROMAN was given the warnings by Officer Paekukui before the polygraph, she had no reason to believe that *she* was the focus of any police investigation. Rather, she was the victim of the crime. Nothing suggests that she was told by Paekukui that if Paekukui found her deceptive on the test, she would be arrested for false report. Nor is there anything in the warnings themselves, *see* Exhibit B, that suggests that Ms. ROMAN was waiving her rights with regard to anything other than the *polygraph examination itself*. Nothing in the waiver form suggests that post-test questioning was contemplated. When the purpose of the session shifted from administering the polygraph exam to eliciting incriminating statements from Ms. ROMAN, she should have been given specific *Miranda* warnings informing her that she had become the focus of the investigation.

The issues are even clearer with regard to the written statement. Ms. ROMAN was taken, by a different officer, from the location of the polygraph to a separate interrogation room. There she was interrogated again, and a written statement was produced. There is no way that the warnings given before the polygraph exam, which related only to the polygraph exam, could be sufficient to protect Ms. ROMAN's rights at that point. She had not only become the "focus" of the investigation, a decision had already been made – unknown to her, of course – to arrest her for false complaint. At that point, it was surely incumbent upon the police to inform Ms. ROMAN that she was herself a suspect and she need not make any incriminating statements. Because Officer Fujinaka, with apparent deliberation, failed to properly warn Ms. ROMAN as required, her written statement should be suppressed.

The facts of this case suggest nothing other than a deliberate attempt by the police to subvert Ms. ROMAN's *Miranda* rights. Ms. ROMAN went to the police station in good faith to take a polygraph exam. Whether she was given a "fair" polygraph by Paekukui is a matter only for speculation. At any rate, when the polygraph was completed and the investigation had shifted to Ms. ROMAN herself, the police were obligated by law to treat her fairly. But Ms. ROMAN was not treated fairly, and for that reason asks this court to grant her motion to suppress.

DATED: Honolulu, Hawaii, June 8, 1987.

/s/ Anthony K. Bartholomew
PETER C. WOLFF, JR.
ANTHONY K. BARTHOLOMEW
Attorneys for Defendant
Haila Diane Roman

EXHIBIT A

FOLLOW-UP REPORT

1 REPORT NO.
V-43452

2 CLASSIFICATION
FALSE REPORTING

3 CLASSIFICATION AS OF THIS DATE (IF SAME AS NO. 2 WRITE DNA)

4 DISTRICT NO.
DNA

5 PLAINANT/VICTIM'S NAME
Leighton FUJINAKA

ADDRESS
1455 S. Beretania St

6 DATE OCCURRED
1-15-87

[Material Deleted in Printing]

INSTRUCTIONS: 1) List and describe additional suspects. 2) Indicate if any suspect arrested. 3) List additional witnesses by name, address, phone number, sex, race, and age. 4) Identify partial recoveries – refer to Item Number and value as originally reported. 5) Report all changes to, or additional Information on, property descriptions, serial numbers and inscriptions. 6) Describe additional property lost – continue Item Number [illegible] it off from original report. 7) Record all developments in the case since last report was filed.

ASSIGNMENT

Assigned to the Polygraph Section, Criminal Investigation Division.

BACKGROUND

On January 15, 1987 at about 1352 hours. Haila Diane Roman came to the polygraph section, Criminal Investigation Division to take a polygraph test regarding her statements made in police report #V-34084 Sexual Assault

First Degree. She reported being sexually assaulted on six (6) seperate occassions at the Women's Facility from October 1986 to January 2, 1987, by two male guards.

RIGHTS/HEALTH/WAIVER FORMS

ROMAN was given her Constitutional Rights and indicated that she didn't want the services of an Attorney, understood her rights and would make a statement and take the test. ROMAN was provided with a form to indicate any health problems (p. 2) which she indicated no health problems and signed the form provided.

ROMAN also signed a waiver form indicating she was not forced, coerced or threatened into taking the polygraph examination, which she also signed.

[Material Deleted in Printing]

CHANGE IN STATEMENT

In reviewing her statements of the incident which occurred on January 2, 1987, ROMAN said that a female guard had taken her to "strip-down". In an earlier taped statement she said that a male guard, Brian DONA, had taken her to "strip-down". This was pointed out to her and she said that it was a female guard who took her to strip down and DONA came later.

CHANGE IN DIAGRAM

This writer asked ROMAN to draw a diagram of the incident which occurred on January 2, 1987. In this diagram she indicated the scene of the sexual assault as the shower area. In an earlier diagram made for Detective FUJINAKA, she indicated the sexual assault occurred in the first cell opposite the shower area. This was not pointed out to her.

POLYGRAPH TEST GIVEN

ROMAN was given two (2) series of questions regarding what had been reported by her on January 2, 1987. The first set of questions concerning guard Brian DONA. The second set concerning guard Nick PAEA. My opinion was that she was deceptive in both tests and I informed her of my opinion.

ADMISSIONS MADE

ROMAN at first said she wasn't lying. However, after a few minutes she asked this writer to sit because she had something she wanted to tell me.

ROMAN said that one evening her husband noticed some bruises she had on her body and asked her about it. She said she told him, words to the effect, "What if I told you I was raped by prison guards?", and he responded, "Well, were you?", and she said no, she wasn't. This writer then asked her why she said that and she said, "To see his reaction."

ADMISSIONS MADE

ROMAN then said about a week or so later her husband again inquired about the bruises on her and she said, "It's true, the prison guards did rape me." " Again this writer asked why she said that, again she said to see what his reaction would be. ROMAN said that she intended to tell him it wasn't true but she got a phone call and was talking to a girl friend on the phone when her husband left the house. She said that he had reported what she told him to the police before she could tell him that it wasn't true. The police then became involved and she was unable to tell her husband so she just made up everything else. Nothing happened, she made everything up.

DET FUJINAKA INFORMED

This writer then called Detective FUJINAKA into the room and explained to him that ROMAN was responding deceptively and she admitted she made the whole thing up about the guards sexually assaulting her, that it never happened.

ROMAN then explained to Detective FUJINAKA what she had told this writer. Detective FUJINAKA then asked her how she got the bruises, and she said she didn't know but it was from the weekends that she spends in the Women's Facility.

Detective FUJINAKA then said that he would take another statement from her and they both left the room.

DISPOSITION

See reports submitted by Detective FUJINAKA for final disposition.

/s/ John Paekukui
John Paekukui #1063/678710
CID Polygraph Section
1-28-87 1545 hours

EXHIBIT B

WARNING PERSONS TAKING A POLYGRAPH EXAMINATION OF THEIR CONSTITUTIONAL RIGHTS

Haila Roman, I am Det. John Paekukui, a Polygraph Examiner, with the Honolulu Police Department.

I am going to ask you questions about sexual assault which occurred on or about Jan 2, 1987 at Womens Facility.

But first I want to inform you of certain rights you have under the Constitution. Before I ask you any questions, you must understand your rights.

You have a right to remain silent.

You don't have to say anything to me or answer any of my questions.

Any statement you make may be used in court.

You have a right to counsel of your choice or to talk to anyone else you may want to.

You have a right to have an attorney present while I talk to you, however, the attorney will not be in the room while the polygraph examination is being conducted.

If you cannot afford an attorney, the court will appoint one for you.

If you decide to answer my questions without a lawyer being present you still have the right to stop answering at anytime.

Do you want an attorney now? YES ___ NO /s/ HR

Do you understand what I have told you? YES /s/ HR NO __

Would you like to tell me what you know? YES /s/ HR NO __

I, the undersigned, of my own free will do hereby consent to be examined on the polygraph (lie detector) and the results could be given to the person or persons concerned.

Witnessed by:	SIGNED /s/ Haila Roman Name
/s/ John Paekukui Name	88-1029 Noholio Rd Address
HPD Address	
1-15-87 1355 Date Time	1/15/86 1:55 pm Date Time

EXHIBIT C

HONOLULU POLICE DEPARTMENT
STATEMENT FORM

Report No.: V-34084; Dist. No.: ___; Statement of (Name): Roman, Haila D.; Address: 84-1029 Noholio Rd.; Age: 36; D.O.B.: 9/8/50; SSN: 553-54-0725; Res. Phone: 695-5843; Bus. Phone: ___; Complainant/Victim Name: Same; Address: ___; Classification: Sex Assault 1; Date of Occurrence: 1-2-87; Location of Interview: Honolulu Police Dept.

I, Haila Roman, do freely and voluntarily provide the following statement:

I was never raped at the Womens correctional center by Brian Dona or Nick Paea on 10/31/86, 11/7/86, 12/19/86, 12/26/86, 12/27/86 & 1/2/87.

When my husband picked me up at WCCC on 1/3/87, I had asked him what he would do if I had been raped by a guard? He said "nothing" so I said I had been, thinking I would tell him the truth when we got home. Before I had a chance to explain, he had drug the police into it and friends, before long there was no way out. I tried to tell him that I need to talked to him but he always had somebody with him. I kept telling him that I didn't want to report it but he said that I had to.

He had called my parents without consulting me first and there was no way out.

I picked Brian & Nicks name because they were the first ones that came (p. 2) to mind.

I have read this statement prepared by Haila Roman, which consists of 2 (handwritten) pages, and have been given the opportunity to make corrections thereon. I attest that this statement is true and correct, to the best of my knowledge, and that I gave this statement freely and voluntarily without coercion or promise of reward.

Signed: /s/ Haila Roman

Date: 1/15/87 Time 4:45 pm

Witnessed by: ___; Date: ___; Time: ___. Investigator: /s/ L. Fujinaka; Date: 1-15-87; Time: 1645.

EXHIBIT D

FOLLOW-UP REPORT

1. Report No.: V-43452; 2. Classification: Case reporting; 3. Classification as of this date (if same as No. 2 write DNA): dna; 4. District No.: dna; 5. Complainant/victim's name: FUJINAKA, Leighton; Name corrected: [ ] YES [x] NO; Address: c/o HPD; 6. Date occurred: 1-15-87.

[Material Deleted in Printing]

INSTRUCTIONS: 1) List and describe additional suspects. 2) Indicate if any suspect arrested. 3) List additional witnesses by name, address, phone number, sex, race and age. 4) Identify partial recoveries – refer to Item Number and value as originally reported. 5) Report all changes to, or additional information on, property descriptions, serial numbers and inscriptions. 6) Describe additional property lost – continue Item Number sequence left off from original report. 7) Record all developments in the case since last report was filed.

ACTIVITY: At about 1630 hours, 1-15-87, Thursday, Detective John PAEKUKUI called me into the polygraph room where the suspect was waiting. In the presence of the suspect and Detective PAEKUKUI, I was informed by Detective PAEKUKUI that the polygraph testing showed deception by the suspect.

SPONTANEOUS STATEMENT: Looking at the suspect, the suspect stated that she had lied and that she was not raped. I then asked the suspect to accompany me to the interview room where she wrote out her statement as to why she lied about being raped by the prison guards.

While she was writing her statement, I left her to locate my Lieutenant. Unable to locate, I returned.

LIEUTENANT CONTACTED: I met with Lieutenant James NEELY and I apprised him of the facts to this case. He informed me to tape the statement of the suspect and to place her under arrest for False Reporting.

SUSPECT'S STATEMENT TAPED: I met with the suspect and with my tape recorder on, I went over the statement she had written on the Statement Form 252.

SUSPECT STATEMENT: Refer to Statement Form 252 and tape recording. *Note*: Suspect was not warned of her Rights.

SUSPECT ARRESTED: At about 1700 hours, 1-15-87 the suspect was arrested.

DISPOSITION: Case closed.

[Material Deleted in Printing]

Signature of person reporting: /s/ Leighton Fujinaka; Date & time: ___; Date & time reproduced: ___. Report written by: Leighton FUJINAKA; Identification No.: 1126/207680; Date & time: 1-20-87, 1100; Supervisor approving: [Illegible]; Identification No.: 481900.

APPENDIX G

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII	CR. NO. 87-0178
v.	FALSE REPORTING TO LAW ENFORCEMENT AUTHORITIES
HAILA DIANE ROMAN, Defendant.	Trial week: July 20, 1987
	MEMORANDUM IN OPPOSITION TO MOTION TO SUPPRESS ORAL AND WRITTEN STATEMENTS; EXHIBITS A, B

[Filed June 25, 1987]

MEMORANDUM IN OPPOSITION TO MOTION TO SUPPRESS ORAL AND WRITTEN STATEMENTS

I.

FACTS

On January 5, 1987, Defendant Haila Diane Roman (hereinafter "Defendant"), reported being raped on more than one occasion by male prison guards at the Women's Correctional Facility while serving time on weekends for a Theft in the First Degree conviction, Criminal Number 86-0065. Detective Leighton Fujinaka of the Honolulu Police Department's Criminal Investigation Division was assigned to investigate Defendant's reported sexual assaults. He conducted an extensive probe, spoke with Defendant numerous times from January 5 to January 15, 1987, interviewed approximately twenty-three (23) persons, and set up a telephone code system for Defendant to notify police during the weekend of January 9 to 11 if she was again sexually assaulted at the Women's Facility.

As a part of the investigation, Defendant was asked to take a polygraph test and was prepared to do so on January 8, 1987; however, the test had to be rescheduled to January 15, 1987 because Defendant was having her menstrual period on January 8. On January 15, she came to the polygraph section of the police department and was administered the polygraph test by Detective John Paekukui. Before beginning the test, Detective Paekukui gave Defendant her constitutional rights (see Exhibit A). She indicated that she did not want the services of an attorney, understood her rights, and would make a statement and take a test. Defendant also signed a waiver form indicating she was not forced, coerced, or threatened into taking the polygraph test (see Exhibit B).

At the conclusion of the testing, Detective Paekukui determined Defendant was deceptive and so informed her. Defendant first told Detective Paekukui she was not lying; after a few minutes, she changed her story and explained her fabrication of the sexual assault reports.

Detective Paekukui called Detective Fujinaka into the room, explained what had happened (in the presence of Defendant), and then had Defendant tell Detective Fujinaka what she had told him. Detective Fujinaka said he would take another statement from Defendant and he and Defendant left the room.

In an interview room, Defendant wrote out her statement, explaining why she lied about being raped by prison guards. Detective Fujinaka conferred with his lieutenant who instructed him to take a taped statement from Defendant and arrest her for false reporting.

II.

ARGUMENT

Defendant seeks to suppress the oral and written statements made by her to Detectives Paekukui and Fujinaka for alleged violations of her constitutional rights. Defendant's motion should be denied.

A. MIRANDA WARNINGS WERE NOT REQUIRED TO BE GIVEN AS DEFENDANT WAS NOT IN CUSTODIAL INTERROGATION.

Defendant asserts that she was improperly warned of her *Miranda* rights and all statements given by her should be suppressed. The State argues that Defendant was not in custodial interrogation and therefore, *Miranda* rights were not required to be given, or at least not given until the point at which the police had probable cause[1] to arrest Defendant for the crime of false reporting.

---

[1] Defendant argues a *Miranda* violation because she did not know at the time she was given her rights that she was the subject of investigation. Needless to say, neither did the detectives (particularly Detective Paekukui, who was only peripheral to the sexual assault investigation) know that she *would become* the subject of their investigation. The *Miranda* polygraph form itself indicated that Defendant would be asked questions about "Sexual Assault" rather than "False Reporting". At the time the questioning began, Detective Paekukui had no intention or thought of arresting Defendant for False Reporting, nor indeed, could he have arrested her at that point because he lacked probable cause.

The application of *Miranda* is limited. *State v. Melemai*, 64 Haw. 479, 643 P.2d 541, 544 (1982). *Miranda* is not implicated nor are *Miranda* rights required where an individual is questioned in a "non-custodial" setting. Custodial questioning has been defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*, 64 Haw. at 481, *citing Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Because Defendant came to the police station voluntarily to take the polygraph test and she was the alleged victim in the sex abuse investigation at the time the questioning began, she was not the focus of the police inquiry and was not in "custodial interrogation" at the time the polygraph test was given. She was not under arrest, nor under suspicion, and was free to leave. *Miranda* warnings were not required.

B. THE MIRANDA WARNINGS GIVEN WERE SUFFICIENT TO WARN DEFENDANT OF HER CONSTITUTIONAL RIGHTS.

The State argues, secondly, that even if *Miranda* warnings were required, Defendant's motion to suppress should be denied because she *was* sufficiently warned of her *Miranda* rights.

Defendant was read her rights by Detective Paekukui; she signed the form indicating she did not want an attorney; she understood *she had a right to remain silent* and *any statement she made could be used in court*; she wanted to tell Detective Paekukui what she knew. She further signed a waiver form indicating she was not forced, coerced or threatened into taking the exam; that she realized the results would be given to her at the end of the exam; and that she knew the results would also be given to the investigator and persons concerned. Directly after the polygraph test was concluded, Defendant made her statement to Detective Paekukui, confessing that she had falsified the sexual assault complaints.

The State concedes that *Miranda* warnings must be "fresh," i.e., they must not precede the interrogation by "too long a time." *Commonwealth v. Bartlett,* 288 A.2d 796 (Pa. 1972); *People v. Brannon,* 276 N.W.2d 14 (Mich. 1979). But the warnings in this case occurred only a short time before the confession. According to Professor William E. Ringel:

> Generally, warnings given even many hours before the making of an incriminating statement are not considered "stale" when the suspect has been in continuous custody up to the time of the statement.

Searches and Seizures, Arrests and Confessions, (Clark-Boardman, 2d.Ed. 1985) Vol. II, at page 26-13, citing *United States ex rel. Henne v. Fike,* 563 F.2d 809 (7th Cir. 1977). While some periods of time are too long [e.g., 26 days in *Freeman v. State,* 342 So.2d 435 (Ala. 1977) or three days in *People v. Quirk,* 181 Cal.Rptr. 30 (1982)], most courts permit the use of statements taken "many hours," or in some cases, "days," after the giving of *Miranda* warnings. *United States ex rel. Henne v. Fike, supra* (9 hours); *State v. Gilreath,* 487 P.2d 385 (Ariz. 1971) (36 hours); *Gregg v. State,* 210 S.Ed.2d 659 (Ga. 1974) (14 hours); *Joyce v. State,* 637 S.W.2d 386 (Mo.App. 1982) (day before).

Here, Detective Paekukui had no reason or need to re-*Mirandize* Defendant before she made her statement to him. The extensive *Miranda* warnings and precautions given by him at the inception of the polygraph testing were sufficient to warn Defendant of her rights. Only a short passage of time elapsed from the administration of the rights to the Defendant's statement. Defendant was adequately informed under *Miranda*.

Additionally, the confession should not be deemed coerced simply because it followed an announcement of the polygraph results. The use of a polygraph machine, or the announcement of polygraph results, prior to a confession, does not constitute coercion. *State v. Sanders,* 223 Kan. 273, 574 P.2d 559 (1977); *State v. Clifton,* 271 Or. 177, 531 P.2d 256 (1975). A confession made by a defendant in the course of a polygraph examination does not of itself render the confession inadmissible. *State v. Sanders, supra,* 574 P.2d at 563. It is admissible where it has been voluntarily made. *Id.; see also, People v. McHenry,* 104 Cal.App. 764, (1962); *State v. Green,* 271 Or. 153, 531 P.2d 245 (1975); *Greg v. State,* 404 N.E.2d 1348 (Ind. 1980); *Commonwealth v. Smith,* 83 A.2d 1113 (Pa. Super. 1983). According to "Confession Made After Polygraph Test," 89 A.L.R.3d 230 (1979),

> As a general rule, the courts have held that the mere fact that the accused confessed to a particular crime in anticipation of, during, or following a polygraph examination does not in itself render the confession inadmissible as evidence.

89 A.L.R.3d 230, 233, citing, *United States v. McDevitt,* 328 F.2d 282 (6th Cir. 1964); *Thompson v. Cox,* 352 F.2d 488 (10th Cir. 1965); *Canada v. State,* 56 Ala.App. 722, 325

So.2d 513 (1975), *cert. denied,* 295 Ala. 305, 325 So.2d 516 (1975); and cases from California, Florida, Illinois, Maryland, Mississippi, New Mexico, New York, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia and Indiana. Only where the polygraph examination was improperly conducted [e.g., *United States ex rel. Monks v. Warden,* 339 F.Supp. 30, aff'd. 494 F.2d 1337 (3rd Cir. 1972)] or the accused was improperly coerced into taking the polygraph examination [e.g., *People v. Taylor,* 58 Ill.2d 69, 317 N.E.2d 97 (1974)] have courts invalidated a confession rendered after a polygraph test.

While this issue has not been determined in Hawaii, foreign state courts have permitted introduction of confessions even though obtained after the defendant had been presented with adverse polygraph results. In *State v. Keiper,* 8 Or.App. 354, 493 P.2d 750, 751 (1972), the defendants made confessions after being advised that their test results showed "gross deceptive patterns." In *State v. Lerch,* 63 Or.App. 707, 666 P.2d 840, 843 (1983), a detective who administered a polygraph test to the defendant told him that he "knew" that the defendant was not telling the truth. The defendant's subsequent confession was not suppressed. *Id.,* 666 P.2d at 843.

In *People v. Barretto,* 256 Cal.App.2d 392, 64 Cal.Rptr. 211 (1967), the trial court did not err in admitting the confession made by the accused following a polygraph exam. The appellate court stated that there was ample evidence to show that the defendant willingly took the exam, and the fact that the defendant was told that the test indicated deceptive responses (i.e., the accused was not telling the truth), did *not* inherently demonstrate coercion. 64 Cal.Rptr. at 213.

In *Commonwealth v. Hipple,* 333 P.A. 33, 3 A.2d 353 (1939), the court affirmed a conviction and held that the confession of the accused after taking a lie detector test was admissible even if the police officers remarked to the defendant that he could not lie to the machine. The court pointed out that the remark amounted in substance to no more than an admonition to tell the truth, which was proper, since there was no evidence that promise, force or threats were used to elicit an untrue statement. The court noted that while it was possible that the defendant was persauded to confess by the use of the polygraph exam and the remarks of the police officer, without evidence of improper threats or promises, the defendant's objection to the admission of his confession could not be sustained.

Even though polygraph results in the *Keiper, Barretto* and *Hipple* jurisdictions are inadmissible, confessions following defendants' notification of deceptive test results were not suppressed. These courts found that an admonition to tell the truth after deceptive polygraph readings did not constitute threats of punishment or other improper inducements such as would constitute coercion. So long as the police officer's remarks, advice, exhortation, or admonition were not accompanied by threats or promises, and the polygraph exams were consented to, the resulting confessions were admissible at trial.

Such was the instant case. Detective Paekukui merely explained that Defendant's test showed deception; her confession followed shortly. The questioning by Detective Paekukui was a natural follow-up to the test itself. No new *Miranda* warnings were required. Similarly, when Detective Fujinaka was called into the polygraph room following Defendant's confession, it was merely for the purpose of having Defendant repeat her statement to Detective Fujinaka. Defendant's written statement and taped statement were only embodiments of what she had already told Detective Paekukui.

As discussed above, the extensive *Miranda* warnings given to Defendant were sufficient to apprise her of her rights.

III.

CONCLUSION

Based upon the foregoing, the State submits that *Miranda* warnings were not required because the Defendant was not in custody. Secondly, the State submits that even if *Miranda* warnings wre required, they were given in this case and there was no constitutional violation. Wherefore, the State respectfully requests that Defendant's motion be denied.

Dated at Honolulu, Hawaii: June 23, 1987.

Respectfully submitted,

STATE OF HAWAII

By CHARLES F. MARSLAND, JR.
Prosecuting Attorney

By /s/ Sheila Berger
Deputy Prosecuting Attorney
City and County of Honolulu

FXHIBIT A

REPORT NO V-34084
FILE NO 87-012

WARNING PERSONS TAKING A POLYGRAPH EXAMINATION OF THEIR CONSTITUTIONAL RIGHTS

Haila Roman, I am Det. John Paekukui, a Polygraph Examiner, with the Honolulu Police Department.

I am going to ask you questions about sexual assault which occurred on or about Jan 2, 1987 at Womens Facility.

But first I want to inform you of certain rights you have under the Constitution. Before I ask you any questions, you must understand your rights.

You have a right to remain silent.

You don't have to say anything to me or answer any of my questions.

Any statement you make may be used in court.

You have a right to counsel of your choice or to talk to anyone else you may want to.

You have a right to have an attorney present while I talk to you, however, the attorney will not be in the room while the polygraph examination is being conducted.

If you cannot afford an attorney, the court will appoint one for you.

If you decide to answer my questions without a lawyer being present you still have the right to stop answering at anytime.

Do you want an attorney now? YES ___ NO /s/ HR

Do you understand what I have told you? YES /s/ HR NO ___

Would you like to tell me what you know? YES /s/ HR NO ___

I, the undersigned, of my own free will do hereby consent to be examined on the polygraph (lie detector) and the results could be given to the person or persons concerned.

Witnessed by:

/s/ John Paekukui
Name

HPD
Address

1-15-87 1355
Date Time

SIGNED /s/ Haila Roman
Name

84-1029 Noholio Rd
Address

1/15/86 1:55 pm
Date Time

EXHIBIT B

PERSONAL DATA OF SUBJECT

Complainant: Haila Roman; Date: 1-2-87; Report #: V-34084; Address: 84-1029 Noholio Rd.; File #: 87-012; Offense: Sex Assault.

DATE: 1-15-87; TIME START: 1352; TIME END: 1625; NAME: ROMAN, HAILA DIANE; ALIAS: NONE; ADDRESS: 84-1029 NOHOLIO RD.; SSN: 533-54-0725; DOB: 9-8-50; AGE: 36; RACE: CAU; SEX: F; HEIGHT: 5′; WEIGHT: 130; EMPLOYMENT: Unemployed Secretary; PREVIOUS POLYGRAPH EXAMINATION: No; INVESTIGATOR: Det. L. Fujinaka.

WAIVER

I am taking this polygraph examination without any promise of reward or hope of immunity. I am making all statements freely and voluntarily without any threats, either physical or mental, and understand my rights against self-incrimination under the Constitution of the United States and the State of Hawaii.

I have not been forced, coerced, or threatened into taking this polygraph examination. I am taking this examination on my own free will and realize that the results will be given to me at the end of this examination. The results will also be given to the investigator and persons concerned.

/s/ Haila Roman Subject	/s/ John Paekukui Examiner
1-15-87 1440 Date/Time	[Illegible] Witness

APPENDIX H

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT STATE OF HAWAII

:

STATE OF HAWAII, Plaintiff, vs. HAILA DIANE ROMAN, Defendant.	CR. No. 87-0178

TRANSCRIPT OF PROCEEDINGS

before the Honorable Wilfred K. Watanabe, Tenth Judge presiding, on July 10, 1987.

(MORNING SESSION)

APPEARANCES:

DAVID GARDNER, ESQ. Deputy Prosecuting Atty.	For the State of Hawaii
ANTHONY BARTHOLOMEW, ESQ.	For the Defendant

REPORTED BY:

PAQUITO Z. FORONDA, JR., CSR 269, RPR

OFFICIAL COURT REPORTER

FIRST CIRCUIT COURT

STATE OF HAWAII

[Material Deleted in Printing]

(p. 3) (The following proceedings were held in open Court:)

(The clerk called the case.)

(Counsel noted their appearances for the record.)

MR. BARTHOLOMEW: Your Honor, I would like to apologize to the Court for the delay this morning. I've been occupied in a sentencing matter next door and I appreciate the Court's indulgence of that delay.

MR. GARDNER: The State is ready to proceed, Your Honor. The motion to suppress plus an affidavit has been filed and the State is going to call Detective John Paekukui.

JOHN PAEKUKUI,

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GARDNER:

Q. Good morning. State your name and occupation.

A. John Paekukui, Detective of Honolulu Police Department.

Q. Were you on duty on HPD on the (p. 4) afternoon of January 15, 1987?

A. Yes, sir.

Q. Were you on duty that afternoon?

A. I worked at the Criminal Investigation Division, polygraph examiner.

Q. Is that located at 1455 South Beretania Street?

A. Yes, it is.

Q. At that time and place, did you ever come in contact with a Diane Roman?

A. Yes, sir.

Q. If you saw that person again, could you identify her?

A. She's seated here, gray suit.

MR. GARDNER: May the record reflect the detective has identified the defendant.

THE COURT: So ordered.

(By Mr. Gardner)

Q. Detective, how is it you came in contact with Ms. Roman at the time and place?

A. I assisted Detective Fukunaga in the investigation of a sexual assault case.

Q. What assistance did you lend Detective Fukunaga then on January 15th?

(p. 5) A. I conducted a polygraph exam concerning the statement that Ms. Roman made to Detective Fukunaga.

Q. Detective, have you had any participation in this investigation before January 15th?

A. Mrs. Roman had been scheduled on two other occasions to take the polygraph test. January 7th and January 8th. On the 7th, she canceled. On the 8th, she came but did not take the test because of menstrual cramps that she had.

Q. But for the polygraph examination though, did you do anything else to assist in this investigation?

A. No, sir.

Q. Detective, before I go any further, let me ask you what training and experience have you had that qualifies you to administer these polygraph tests?

MR. BARTHOLOMEW: Excuse me. Just to save time, I'm willing to stipulate that the detective is an experienced, qualified and properly trained polygrapher.

MR. GARDNER: With that stipulation, (p. 6) I will proceed.

THE COURT: All right.

(By Mr. Gardner)

Q. Detective, after Ms. Roman arrived at the police station on January 15th, did you indeed give her a polygraph test?

A. Yes, sir. I did.

Q. About what time?

A. I started at 1:52 p.m.

Q. When you began that polygraph exam, did you do anything before you actually began the test itself?

A. Yes, sir.

Q. What exactly did you do?

A. Some forms that we have to fill out before we do the test. The first form is just to get some background information – her name, address, and that information from her.

The second form I go through is the warnings of her constitutional rights. This form is a little bit different from the HPD 81 form. In that, we have an extra sentence in here that says that she can have her attorney present but when the testing starts, the attorney cannot be in the same room.

(p. 7) Q. Detective, when you gave this polygraph test to Ms. Roman on January 15th, was she any kind of a suspect in this investigation?

A. No, sir.

Q. Why did you then administer the polygraph test?

A. Detective Fukunaga scheduled her to take the test because of statements that she had made to him and his investigation. Sometimes we do this in rape cases just to make sure that our investigation is going in the right direction. If she is telling us the truth, then he has to take his investigation.

MR. GARDNER: May I approach the witness at this time?

THE COURT: Yes.

(By Mr. Gardner)

Q. Detective, I show you this document marked for identification as State's Exhibit No. 1.

MR. GARDNER: May the record reflect I have already shown it to counsel.

(By Mr. Gardner)

Q. Do you recognize that document?

(p. 8) A. Yes, sir.

Q. What is it?

A. It's the wanted [sic] persons taking a polygraph examination of the constitutional rights.

Q. Have you ever seen this particular form today?

A. Yes, sir.

Q. When was that?

A. A form we used for Mrs. Roman on January 15th.

Q. How do you recognize this as a form that you used on that particular day?

A. I recognize my handwriting on this form and my signature.

Q. Is there a date on it as well?

A. Yes. January 15th, 1987.

Q. Detective, is that an original document or a Xeroxed copy?

A. It is a Xeroxed copy.

Q. Does it appear to be a fair and accurate copy of the original?

A. Yes, sir.

Q. Detective, how did you use that document or the original to inform Ms. Roman of (p. 9) her constitutional rights?

A. I wrote in the top portion her name, my name, my position there, the offense, date and location where this offense occurred, and I read to her this form as she put the form in front of her and she read it as I went along the form, and I told her that she had the right to an attorney and the same right as anybody else, even though she's not arrested – not a suspect in this case: She's got the same rights as anybody else and she indicated that she didn't want the services of an attorney at this time. She understood what I told her and she would made a statement.

Q. Detective, in addition to what you told this Court, is there anything else, specifically, that you said to inform Ms. Roman of her rights before you began on this polygraph test?

A. This rights form?

Q. Yes, sir.

A. There's another form that we go through, which is a waiver, and this form is assigned just before we administered the polygraph test.

(p. 10) Q. Detective, I show you the second form, marked for identification as State's Exhibit No. 2. Do you recognize that?

A. This is a form. This is a personal data of subject and also on the bottom portion of this is a waiver that she signs, indicating that she understands that polygraph test is strictly voluntary and there's no promises of reward or hope of immunity in any statement to us and she's not being forced or coerced to take any test and results given to her.

Q. Detective, when you showed these forms to Mrs. Roman, State's Exhibits 1 and 2 for identification, and you read them out loud to her and she followed along, did she indicate to you that she understood what you had read to her?

A. Yes, she did.

Q. How did she give that indication?

A. She signed her name on the bottom of both forms and she put her initials on the constitutional rights form.

Q. Did she also indicate the time when those two signatures were executed?

A. On the constitutional rights form, (p. 11) she put down the time as 1:55 p.m.

Q. On the waiver form?

A. That form there, I put the time down. It was at 2:40.

Q. Incidentally, on Document No. 2, Exhibit No. 2 for identification, how do you recognize that document as the waiver form signed by Ms. Roman on January 15th?

A. I also signed the form.

Q. Are those two Xeroxed copies fair and accurate representations of the original?

A. Yes, it is.

Q. Are they in substantially the same condition now as the original was in when it was executed on January 15th?

A. Yes.

Q. Detective, Before Ms. Roman signed those two documents, did you make any promises to her about what would happen if she took this test?

A. No.

Q. Did you tell what might happen if she did not take this polygraph test?

A. No.

Q. Did you make any threat to her of (p. 12) any kind?

A. No.

Q. When she signed these two documents, what was her demeanor like?

A. She understood.

Q. Was she calm? Agitated? Excited? Anything like that?

A. She was calm.

MR. GARDNER: Your Honor, the State would offer in evidence as State's Exhibits 1 and 2 the constitutional rights form and the waiver form, which have been identified and authenticated by Detective Paekukui.

MR. BARTHOLOMEW: No obejection.

THE COURT: Both will be received.

(State's Exhibits 1 and 2 were received into evidence.)

(By Mr. Gardner)

Q. Detective, following the execution of State's Exhibits 1 and 2, did you then administer this polygraph test to Ms. Roman?

A. Yes, I did. But before that, there was another form we went through just to see if she was physically fit to take the test at that (p. 13) time.

Q. What other steps did you take before the test was begun?

A. Just to make sure she was physically fit to take the test, and the form that she signed was that she was in good health and there was no physical problems that day and that time.

Q. Why was that important before giving this test, Detective?

A. Because if she was having any kind of physical problems, like any kind of pain, it may show up on the charts and it's difficult to distinguish pain from a response. A pain response and a deceptive response look similar.

Q. Is that the reason why the January 8th test was continued to January 15th?

A. Yes, sir.

Q. When you informed Ms. Roman or asked her about her physical health on January 15, did she have any problems?

A. No, sir.

Q. Did she indicate any pain or discomfort at that time?

A. Not at all.

(p. 14) Q. Detective, did you discuss with Ms. Roman on January 15th the polygraph test that you had administered to her?

A. Yes, sir.

Q. Did you also discuss with her the questions that you would be asking?

A. Yes, sir.

Q. How did you do that?

A. Well, I had already prepared by listening to the tapes and reading through the police report and when she came in, I asked for her statement, again, to tell me what happened and I noticed that her statement was a little bit different in one aspect where she said that the female guard had taken her to the back, strip down area, and in the earlier taped statement, she said it was male guard. When I pointed it out to her, she said that the female guard had taken her back first and then the male guard came after. This was different from the original statement she made.

Q. Are these some of the questions you discussed with Ms. Roman before the test began?

A. This is some of the area of her statement that I wanted to get straight so we (p. 15) understood. There was a total of ten questions for the first test that I asked her and these questions had to be agreed upon, that incident that occurred on January the 2nd, 1987.

Q. In order to reach that agreement, did you discuss those ten questions with Ms. Roman before the test?

A. Yes, we did.

Q. Did you administer a second test during this polygraph examination?

A. The second test was given for the second person. There were two accused persons in this case.

Q. Detective, is that why you executed a second waiver form for Ms. Roman?

A. No. There was no second waiver form.

Q. I see. Did you discuss with Ms. Roman the questions that would be used during that second test as well as the first?

A. Yes, sir.

Q. How many questions were used in the second test?

A. Ten questions.

Q. Did you fully explain to Ms. Roman (p. 16) what those questions would be before the test began?

A. Yes.

Q. Detective, did Ms. Roman agree to the questions that would be used during the first and second test?

A. Yes, she did.

Q. Following that agreement and the discussion of the questions, following the execution of the rights form and the waiver and also the physical health form, did you then begin the polygraph test?

A. Yes, sir.

Q. About how long did the two tests take?

A. Well, at about 2:45 we started the first test and we completed the second test at about 4 o'clock.

Q. During the course of those tests, Detective, were you able to form a conclusion or an opinion as to whether Ms. Roman had been truthful or deceptive to you?

A. Yes, sir. I did.

Q. What opinion did you reach?

A. I told her that she was not being (p. 17) completely truthful in her answers.

Q. How did you reach that conclusion?

A. By the reactions that she had recorded on the polygraph charts.

MR. BARTHOLOMEW: Excuse me. At this point, I would like to make an objection. I understand that there's no way to have this motion without discussing the fact that Ms. Roman took a polygraph test and the fact that the detective concluded that she failed was also one of the relevant events.

At the same time, I want to make it clear that if the detective's statement that she failed the test is going to be received by the Court as any evidence that she was, in fact, lying about the matters tested – for that purpose, the evidence is clearly not admissible under State versus Chang.

THE COURT: Well, your objection will be noted. You may proceed.

(By Mr. Gardner)

Q. Detective, did you inform Ms. Roman, then, of your conclusions after the test?

A. Yes, sir.

(p. 18) Q. When you informed Ms. Roman that you concluded that she was not being entirely truthful with you, what response did she give, if any?

A. At first, she said that she was telling the whole truth and at that point, she wouldn't make any other statements that she was just telling the truth about what had happened, continued to talk to her about this result of the test, and when I told her that it appeared that she was carrying a heavy burden because of this test, and that if she would tell the truth, it would probably make her feel better instead of feeling this burden. That's when she asked me to sit down because she wanted to tell me something. This is when she told me that she lied in the test and nothing happened and she made everything up.

Q. Well, Detective, how soon after the polygraph test ended did you inform the defendant of your conclusion?

A. After reviewing the charts – it took me a couple minutes to look at all the charts.

Q. How soon after you told Ms. Roman (p. 19) of your concludion did she then instruct you or tell you that she lied?

A. It was a couple minutes later, maybe about five minutes.

Q. Before the test began, you had instructed Ms. Roman that you would be informing her of the results of this test?

A. Yes.

Q. Was that one of the items that were discussed before she signed that rights form and waiver form?

A. Yes, it is.

Q. Detective, did Ms. Roman volunteer any explanation why she had made the story up?

A. She told me that her husband had noticed some bruises on her body as he was bringing her back from the facility and questioned her about the bruises, and she said she told him that, to the effect, "What if I told you that the guards raped me?" And I asked her what was his response, and she said that he asked her, "Well, did they?" And she said, "No. That didn't happen."

I asked her why she made a statement like that to him and she said, "Just (p. 20) to see what his reaction would be like."

She said there was another occasion, about a week or so later, where she was coming home. Again, she had some bruises on her body and, again, her husband had asked her how she received those bruises. She said, "It's true, the guards did rape me." And again I asked her, why did she say that, and she said the same thing, "Just to see what his reaction would be."

Then they continued on to home and when she got home, she said she intends to tell him that she wasn't telling him the truth but she received a telephone call and while she was on the phone, he had left the house to go to the store. When he had come back from the store, the police was with him and so she felt trapped at that point where she had to go on with her story.

Q. Detective, when Ms. Roman explained to you that she had been lying and why she had lied, did you observe physical demeanor at that time?

A. Yes, sir.

Q. What did you observe about her?

(p. 21) A. - She was very calm and to me, appears she was relieved from all this pressure of lying to her husband.

Q. Did you do anything to coerce Ms. Roman into telling you that she lied?

A. No, sir.

Q. Did you raise your voice at any time before she changed her story?

A. No.

Q. Did you threaten her in any way?

A. No, sir.

Q. Following Ms. Roman's explanation about having lied about this complaint, what happened next?

A. I told her that I would have to tell the detective who's handling the case. Went to get Detective Fukunaga and brought him in the office, and I explained to Detective Fukunaga what had happened and I told him that my opinion shows deceptive and she needed to tell Fukunaga that she wants to tell the truth.

Detective Fukunaga asked her how she received her bruises. She said she didn't know how but she received it from the women's facilities.

(p. 22) Q. Was Ms. Roman taken anywhere at that point after she had admitted this to both you and Detective Fukunaga?

A. Detective Fukunaga took her in the back to get another statement from her.

Q. At that point, did you relinquish custody of the defendant to that other detective?

A. Yes, sir.

Q. Did you have any more contact with her following the close of that polygraph exam, then?

A. No, sir.

Q. Detective, did everything you've explained occur in the City and County of Honolulu, State of Hawaii?

A. Yes, sir.

MR. GARDNER: Thank you very much.

Your witness, Counsel.

CROSS-EXAMINATION

BY MR. BARTHOLOMEW:

Q. Detective Paekukui, how long have you been a polygrapher?

A. Went to school in 1979.

Q. Since that time, has a polygrapher (p. 23) been your primary occupation within the Police Department?

A. Not until about '83.

Q. So for the last four years or so you've been pretty much exclusively a polygrapher for the Police Department?

A. Yes, sir.

Q. Now, you said when the polygraph exam that you conducted on January 15th began, that Ms. Roman was not a suspect. Do you remember that statement?

A. Yes, sir.

Q. By that, you mean she hadn't been notified? She wasn't being investigated for any offense?

A. I don't understand the question.

Q. Well, what do you mean by "suspect"?

A. She wasn't a suspect in our case here.

Q. The case that you're referring to is the sexual assault case that you were investigating?

A. Yes, sir.

Q. That's the sexual assault case (p. 24) that's reflected here in the upper portion of Exhibit 1 where Ms. Roman was informed what she was doing down there?

A. Yes, sir.

Q. Now, that sexual assault case was a case where she was the complaining witness?

A. Yes, sir.

Q. The purpose of the polygraph exam was to determine – I think you said – whether your investigation was going in the right direction?

A. Yes, sir.

Q. What that means is to determine whether or not Ms. Roman was telling the police the truth?

A. Yes, sir.

Q. Detective Fukunaga, before the exam, already suspected that Ms. Roman wasn't telling the truth?

A. You have to ask him that. I don't think so.

Q. Didn't he tell you that?

A. He just told me her story was inconsistent.

Q. You concluded from that that he had (p. 25) some suspicions, didn't you?

MR. GARDNER: I object. That's calling for speculation, Your Honor.

THE COURT: Sustained.

(By Mr. Bartholomew)

Q. He told you that her story was inconsistent. There were inconsistencies?

A. Yes, sir.

Q. You were well aware of what her story was because you've listened to the taped statement. Correct?

A. Yes, sir.

Q. And you read Detective Fukunaga's report?

A. Yes, sir.

Q. In fact, in your pretest interview with Ms. Roman, you noticed that when she told you about – at least one aspect of the cases appeared to you to be inconsistent with prior statements?

A. Yes, sir.

Q. Ms. Roman made a drawing for you at that time, didn't she?

A. Yes.

Q. Something about that drawing that (p. 26) made you suspicious that there was an inconsistency?

A. Yes, sir.

Q. Did you discuss that with Ms. Roman?

A. No.

Q. Now, as I understand it, Detective, the art of polygraphy is not only a process of conducting the exams but it's also considered to include how you handle the examinee after the exam. Is that correct?

A. Yes, sir.

Q. When you're in polygraphy school, isn't it true that one of the things that they even keep records of is how well you do on your test, not only whether you're correct or incorrect in your conclusions about the truthfulness of the suspect or the subject – I mean, but also whether or not cases where you conduct that the subject is lying, your success in getting a confession after the exam. That's correct, isn't it?

A. Are you asking –

Q. I'm saying the polygrapher gets the confession after the exam?

(p. 27) A. Yes, sir.

Q. In fact, as an experienced and qualified polygrapher, you might take some pride in your ability to get a confession after you've detected falsity?

MR. GARDNER: Your Honor, I object. This is assuming facts totally not in evidence. This is really going far afield.

THE COURT: Overruled.

(By Mr. Bartholomew)

Q. You may answer, Detective.

A. If I feel that the person is responding to the question, then I should resolve the reason why she's responding to that particular question.

Q. Now, when you begin a polygraph exam, generally speaking, your intention, before you even start, if the subject proves to be untruthful as you see it, is to attempt to get a confession from that suspect. That's true, isn't it?

A. Not completely true. What we try to do is to get them to explain why they are responding to the question. If they are responding because they're not telling the (p. 28) truth, then that's a reason why I continue with the interrogation. If there's some other reason why – not in this particular case – but in the case where a person was an accomplice, he had knowledge, then we go into that aspect of the test. He may not be responsible for the crime but he may have knowledge of the crime.

Q. Did you inform Ms. Roman that if she failed your test, that she would be charged with false reporting?

A. No. That doesn't come up at that point until after she had made the statement to us that she had lied.

Q. I gather you mentioned that your form – I believe it's in the waiver section at the bottom of what's marked as State's Exhibit No. 2 – that Ms. Roman was informed that she would be told what the results of your test were?

A. Sure.

Q. Well, you didn't tell Ms. Roman that you intended to interrogate her about the results of your test, did you?

MR. GARDNER: I object, again. I (p. 29) think that also is assuming facts not in evidence. I also think that's misstating the testimony of the detective. He indicated he informed the defendant that he would be notifying her of the results of the test.

I think, now, counsel is placing very, very different connotations on that notification.

MR. BARTHOLOMEW: Well, obviously what the defendant understood when she executed her waiver has everything to do with whether that was a knowing and intelligent waiver.

THE COURT: Overruled.

A. Please repeat the question.

(By Mr. Bartholomew)

Q. You didn't inform Ms. Roman that if she failed your test, you intended to interrogate her about why she failed, did you?

A. I didn't tell her that, no.

Q. But did you, in fact, intend that should she fail your test, to follow it up and question her about that?

A. Yes, sir.

Q. Now, after the test was completed, you left the room, is that correct, to score (p. 30) your charts?

A. No, sir.

Q. You scored the charts in Ms. Roman's presence?

A. Yes.

Q. Did you leave the room at any time after the test was completed while Ms. Roman was still in the room?

A. I don't recall if I did or I didn't.

Q. You don't recall leaving her alone in the room?

A. No.

Q. Is it your practice to score the test right in front of the suspect or subject of the test?

A. It all depends. We have two rooms and if the other room is being used, we just stay where we are.

Q. Was the other room being used on that occasion?

A. I think it was at that time.

Q. Are you sure of that?

A. No. I'm not real positive but I think it was.

(p. 31) Q. If the room wasn't being used, would it have been your normal practice to go in there and score the test?

A. It's all different with everybody. It depends.

Q. Now, one of the things that's necessary in the polygraph technique, is it not, for the subject to believe before the test that if they lie, the test will detect it?

A. Yes.

Q. You tell the subject that the test will detect or certainly detect if they lie?

A. Sure.

Q. You also tell them if they're telling the truth, their problems will be over or that they won't have nothing to worry about. That's true, isn't it?

A. Not exactly those words but, yes.

Q. It's important that they feel that, first, that the test will work and, second, that they have a stake in the outcome?

A. Yes.

Q. It's necessary for the test to be a valid test?

A. Yes.

(p. 32) Q. In the same vein, Detective, when you finish a test and you have detected or concluded, based on the reading of the polygraph charts, that deception is indicated, isn't it true that the appropriate polygraph technique at that point is to inform the subject that they failed the test absolutely, clearly. That it's just certain. That's true isn't it?

A. Yes, sir.

Q. That's part of the psychological technique of, at that point, getting the subject of the test to open up and tell you what you want to know?

A. Yes.

Q. Now, did you inform Ms. Roman at the point when you scored the test that in your view, she was now a suspect in a criminal case?

A. No, sir.

Q. Did you, in fact, consider her a suspect at that point in an entirely different criminal case?

A. Well, this has happened before where a person has admitted lying on a test like this, and we have had to arrest a person (p. 33) for false reporting.

Q. You certainly contemplated it as a possibility that Ms. Roman might be arrested for false reporting?

A. I think I informed her at that time there's a possibility she could be arrested.

Q. In fact, when you continued to question her after the test was over, you were gathering evidence to support that charge, were you not?

A. I don't understand the question. Can you repeat that?

Q. Well, what was your reason for questioning Ms. Roman when the test was over, if not to gather evidence about her false reporting?

A. It wasn't until Detective Fukunaga was in the room when I informed her there's a possibility that she could be arrested for making false complaints.

Q. That was after she had already made the statement to you about why she said what she said?

A. Yes.

Q. Now, you said, Detective, that (p. 34) after the exam was over and several minutes passed while you scored your charts, that you informed her that, in your view, you informed Ms. Roman – in your view, she was not telling you the truth?

A. Yes, sir.

Q. Her initial response was that she was telling the truth?

A. Yes, sir.

Q. You had to question her for some minutes before she changed that response?

A. Yes, sir.

Q. You did question her?

A. Yes, sir.

Q. You didn't, at that point, warn her that what she said might be used as evidence against her in a false reporting case?

A. No, sir.

Q. You didn't tell Ms. Roman that she was free to leave, did you?

A. I told her at the beginning of the test.

Q. But did you tell her that at the end of the test, when you were questioning her about the false report that you believed had (p. 35) been made?

A. I didn't mention false report until Detective Fukunaga was in the room.

Q. Right. But you told us a few moments ago that from your past experience, you certainly knew that a false report case was possible?

A. Yes, sir.

Q. In fact, you called Detective Fukunaga into the room to inform him that she made statements suggesting that a false report was made so he could determine what to do about it?

A. Yes, sir.

Q. While you said that, at one point Ms. Roman said that you should sit down and she would tell you something?

A. Yes, sir.

Q. Before that point, you were, in fact, standing over Ms. Roman, were you not?

A. Standing by the door.

Q. She was seated?

A. She was seated, yes.

Q. Certainly there was a chair available for you to be sitting in during this (p. 36) conversation?

A. Yes, sir.

Q. Did Ms. Roman indicate to you that she wanted to leave the room at any time, Detective?

A. No, sir.

Q. You denied that she said, "I want to go home"?

A. I don't recall her saying that.

Q. During the time when you were telling her that she was not telling you the truth and she was denying it –

MR. GARDNER: Your Honor, I object. That misstates the detective's testimony. His testimony is that he indicated to her she was not being entirely truthful to him. That's quite a bit different from counsel is now alleging the detective said. My objection is on the record.

MR. BARTHOLOMEW: I'll rephrase it. I'm narrowing it to a particular time frame.

(By Mr. Bartholomew)

Q. You said there was a period of seven minutes from when you first told Ms. Roman that you believed she had been (p. 37) untruthful with you?

A. Yes, sir.

Q. Before she said, "Sit down. I want to talk to you," there was a period of several minutes before the first mention of "You believed her to be untrue" to the point where she said, "Sit down"?

A. Yes, sir.

Q. During that period, I think you indicated it could have been as much as five minutes?

A. Yes.

Q. During that period, you said you didn't recall. I'm asking you, do you deny that during that period Ms. Roman said, "I want to go home"?

A. She didn't tell that to me.

Q. Then, I take it you didn't respond to her, "You're not going anywhere until we get to the bottom of this."

A. I never said that.

MR. BARTHOLOMEW: Nothing further, Your Honor.

THE COURT: Redirect?

MR. GARDNER: Yes, Your Honor.

(p. 38) REDIRECT EXAMINATION

BY MR. GARDNER:

Q. Detective Paekukui, before you began the polygraph test, when you informed Ms. Roman of her rights, was that a pretest interview?

A. Yes, sir.

Q. Following the completion of the test itself when you informed Ms. Roman of your findings and conclusions, was that a posttest type of interview?

A. After the truth phase, yes. We're going to a posttest.

Q. Was that an entire combination, the test itself, pretest interview and the posttest all part of the polygraph examination?

A. Yes, sir.

Q. Did you explain that to Ms. Roman before you began?

A. Yes, sir.

Q. Counsel asked you in cross-examination about some contradictions Ms. Roman had made that you became aware of before this test was begun. Is that correct?

A. Yes, sir.

(p. 39) Q. Isn't it true that – pardon me. How many different rape incidents were complained of by the defendant, if you know?

A. She reported there was six incidents, from October to January 2nd.

Q. That would be about a three-month period?

A. Yes, sir.

Q. Did you ever consider the possibility, before this test began, that some of the discrepancies might have been because of the number of different incidents and the length of time they covered?

A. Yes, sir.

Q. When you became aware of these discrepancies in Ms. Roman's stories, did you automatically think that she had become a suspect in this case?

A. No, sir.

Q. Before the instrument phase of the test, did you tell Ms. Roman to tell the truth?

A. Yes, sir.

Q. Following the test, during the posttest exam, did you also tell her the same (p. 40) thing?

A. Yes, sir.

Q. During the postinstrument phase of the test, when you talked to Ms. Roman about how many questions you did ask her, before she told you to sit down, then she told you that she had lied?

A. I can't recall.

Q. In your exact statement to Ms. Roman that began the postinstrument phase of the test, your exact words, again, were what?

A. That she was not being completely truthful in her statement.

Q. Did you ever tell Ms. Roman that you felt that she had lied to you?

A. I probably did. I don't recall using that word but I usually tell them if a person is not being truthful, that they're not being completely truthful.

Q. At one point, you said that Ms. Roman appeared to have something on her chest?

A. To me, it looked like she was carrying a burden because of this statement (p. 41) that she had made to Detective Fukunaga.

MR. BARTHOLOMEW: I'll object to that response. Maybe I should have objected before but I think the witness can say what he saw but not what he concluded about Ms. Roman's internal state.

THE COURT: Sustained.

(By Mr. Gardner)

Q. Detective, during the postinstrument phase of this exam, did you again ever hover around Ms. Roman at any time?

A. No, sir.

Q. Ever raise your voice to her?

A. No, sir.

Q. If she said something like, "I want to go home," would you have terminated the exam at that point?

A. Yes.

MR. GARDNER: Thank you. No further questions.

THE COURT: Mr. Bartholomew.

MR. BARTHOLOMEW: Briefly.

RECROSS-EXAMINATION

BY MR. BARTHOLOMEW:

Q. Are you saying, Detective, that you (p. 42) told Ms. Roman at the time she executed her waiver, that you intended to question her when the test was over?

A. No. I didn't say that.

Q. You didn't tell her there was going to be a post-test interview, did you?

A. No, sir.

Q. But there certainly was intending to be a posttest interview?

A. It all depends on the results of the test.

Q. You said – you actually test on ten questions. You ask ten questions?

A. For each person.

Q. You ran three series on each set of ten questions, didn't you?

A. Yes, sir.

Q. Now, the ten questions are all questions that you've discussed beforehand with the subject?

A. Yes, sir.

Q. In fact, of those ten questions, only certain ones are the crucial questions that the test is designed to detect truthful or falsity?

(p. 43) A. Yes, sir.

Q. Usually, three or four questions out of ten?

A. Four questions.

Q. Of the remaining six questions, some of those are questions as to which there's no doubt about the truthfulness of the answer, isn't there?

A. Yes, sir.

Q. You need to have that in order to balance the responses to the key questions with the other questions?

A. Yes, sir.

Q. So when you say you weren't being completely truthful with me, you're really conveying nothing more than "You lied on some of the questions and some of them you didn't." Is that correct?

A. Yes, sir.

MR. GARDNER: I object. I think the words that were spoken will speak for themselves.

THE COURT: Overruled. He said, "Yes."

(p. 44) (By Mr. Bartholomew)

Q. Certainly no doubt that when you said "completely truthful or you've lied to me," you may have said that, you admit it?

A. Yes, sir.

Q. You conveyed to Ms. Roman under no certain terms that she failed your test?

A. Yes, sir.

Q. That's part of the technique?

A. Yes, sir.

MR. GARDNER: I object to that. Again, it calls for speculation as to what Ms. Roman interpreted in all of this and I object on those grounds.

THE COURT: Overruled.

MR. BARTHOLOMEW: Nothing further, Your Honor.

THE COURT: Anything else?

MR. GARDNER: Nothing else, Your Honor.

THE COURT: Thank you, Detective.

We will recess until 1:30. We'll take the return on the bench warrant at this time.

(The Court recessed.)

APPENDIX I

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII, Plaintiff, vs. HAILA DIANE ROMAN, Defendant.	)	No. CR-87-0178

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Had Before The Honorable WILFRED K. WATANABE, Tenth Division, on Friday, July 10, 1987, on MOTION TO SUPPRESS ORAL AND WRITTEN STATEMENTS.

(AFTERNOON SESSION)

APPEARANCES

For the Plaintiff: DAVID GARDNER, ESQ.

For the Defendant: ANTHONY BARTHOLOMEW, ESQ.

REPORTED BY: Ann Kilroy, CSR #144
Official Reporter

(p. 2) (The case was called by the clerk.) (1:35 p.m.)

(Appearances were entered by counsel.)

MR. GARDNER: Your Honor, the State would call Leighton Fujinaka.

LEIGHTON FUJINAKA

the witness, called in behalf of the Plaintiff, duly having been sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. GARDNER:

Q Good afternoon, Detective. State your name and occupation.

A Leighton Fujinaka. I am a detective with the Honolulu Police Department.

Q Detective, were you on duty with the Honolulu Police Department on the afternoon of January 15th, 1987?

A Yes, I was.

Q Would you direct your attention to the Main Police Station, 455 South Beretania Street. At that location at that time did you ever come in contact with a Ms. Haila Diane Roman?

A Yes, I did.

Q If you saw that person today could you identify her?

A Yes, I could.

Q If that person is in the courtroom would you point (p. 3) to her and describe what she is wearing.

A The caucasian female, blonde hair, red dress and grey jacket, sitting there.

MR. GARDNER: May the record reflect identification of the Defendant?

THE COURT: So ordered.

Q (By Mr. Gardner) Detective, was January 15th the first day you had been in contact with Ms. Roman in connection with your police duties?

A No.

Q When had you first come in contact with her?

A Initially I made contact with her on January 5th at approximately 4:00 p.m.

Q How was it you came in contact with her at that time?

A Earlier that day I was notified by my lieutenant that a case might be coming in. I am with the sex crimes detail. And a victim alleged that she had been sexually assaulted by two prison guards at the women's prison facility. This is approximately 10:00 a.m. on January 5th. At approximately 4:00 p.m. I got a call to meet with the victim in the case at Kapiolani Sex Abuse Treatment Center. That was the first time I met with the Defendant.

Q Subsequent to that time, Detective, did you pursue an investigation of these allegations by Ms. Roman?

A Yes, I did.

(p. 4) Q Briefly, between January 5th and January 15th what investigation did you conduct?

A I interviewed or confronted twenty-three people. I processed the scene, which was the prison, recovered evidence. I reconstructed the scene on a number of occasions, and I confronted and interviewed the victim on numerous occasions, in this case the Defendant.

Q Detective, on January 5th what contact did you have with Ms. Roman at that time?

A She had an appointment to take a polygraph at 2:00 p.m. I briefly met with her at that time. And Detective Paekukui then took her into the polygraph room.

Q Detective, let me ask was that polygraph examination of Ms. Roman a standard part of your investigation?

A It is, yes.

Q What happened when this polygraph test was given to Ms. Roman?

A What happened after the polygraph test was given?

Q Yes. What was your involvement after this afternoon of January 15th when the test was given?

A I had no involvement at all.

Q Did you become involved after the test was given?

A Yes.

Q What happened then that led to your involvement?

A About 4:30 p.m. Detective Paekukui called me into (p. 5) the polygraph room. I entered the room and, with Detective Paekukui and the Defendant present, Detective Paekukui informed me that the Defendant had shown deception on the polygraph. Upon hearing that I looked at the Defendant. And she then told me that she had lied and she was not raped.

Q Were those Ms. Roman's exact words?

A As far as I can recall, yes.

Q What demeanor did you observe on Ms. Roman when she said that?

A She appeared to be calm and composed at the time.

Q What happened after she told you that she lied and had not been raped?

A I asked her if she would be willing to write out a statement form to that effect. And she said that she would. And I accompanied her to the CID interview room. At that time she proceeded to write out a statement on the HPD-252 form that we utilize.

MR. GARDNER: May I approach the witness, Your Honor?

THE COURT: Yes.

Q (By Mr. Gardner) Detective, I show you this document marked for identification as State's Exhibit 3. Do you recognize it?

A Yes, I do.

Q What is it?

A This is the HPD-252 statement form that was used by (p. 6) the Defendant in writing out her statement on January 15th, 1987.

Q Is it the original or is it a copy?

A This is a Xerox copy.

Q Does it appear to be a fair and accurate copy of the original?

A Yes, it is.

Q How do you recognize that is a copy of the original document that was filled out by Ms. Roman on January 15th?

A It has her name written on the top of the page; the classification, which is sex assault in the first degree; the police report number. It's also signed by her, witnessed by me. And my signature is on the right corner bottom.

Q Detective, at the bottom of that document isn't there a statement which is typed in and part of the document itself?

A Yes, it is.

Q Did you ever read part of that document to Ms. Roman before she signed it?

A It's normal procedure. In my case I read it verbatim to all people before they sign it.

Q Did you read that part of the statement word for word to Ms. Roman?

A The typewritten statement? I read the whole thing.

Q Could you read that out loud in court.

(p. 7) A I read the statement prepared by – and it's written – Haila Roman, which consists of two handwritten pages – typewritten has been crossed out – and have been given the opportunity to make corrections thereon. I attest that the statement is true and correct to the best of my knowledge and that I gave the statement freely and voluntarily, without coercion or promise of reward.

Q When you read that part of this 252 document to Ms. Roman, how did she respond to that?

A She acknowledged what I told her as far as understanding it. And I asked her to sign the bottom of the form. And she did.

Q Detective, at any time during this meeting of yours with Ms. Roman did she indicate that she had been coerced into making that statement to you?

A No, not at all.

Q Did you do anything to coerce her into making that handwritten statement?

A No, I did not.

Q Were any promises made by you regarding this statement?

A No promises.

Q Were any threats made by you if she did not sign this statement?

A No threats.

(p. 8) Q During this entire time she filled out this statement was her demeanor still, quiet?

A She was.

Q During the time Ms. Roman was in your custody, Detective, did you ever inform her of her constitutional rights?

A No, I did not.

Q Why not?

A After she had made a spontaneous utterance to me and the polygraph in the presence of Detective Paekukui and myself and after getting her permission to write out her statement on the statement form, my intention was just to close the case for insufficient evidence, because of the deception that was discovered. However, I did inform her in the polygraph room, if I recall correctly, that she may be arrested for making a false report. At that point I had no indication or intention of placing her under arrest. Basically, mainly to close the report, while she was writing out her statement form in the interview room I went to look for my lieutenant. I left her alone to inform him of the progress of this particular case. I was unable to locate him at that time. I then returned back to the room. She had just about finished the statement form. I left her again. I found the lieutenant. I informed the lieutenant what had happened. And it was at that point the lieutenant instructed (p. 9) me to place her under arrest for making a false report and also to tape record her written statement.

Q After you got that information from your lieutenant what did you do next?

A The Defendant had already written out her statement on the statement form. I went back to the interview room. I asked her if I could tape record her statement that she had written and talk to her about what she had just wrote. And she agreed. I turned on the tape recorder, and she went over this witness statement that she had written earlier.

Q Following that was Ms. Roman arrested?

A Yes, she was.

Q Detective, during any of the time Ms. Roman was in your custody did she ever ask to leave that area?

A No, she did not.

Q Did she ever say that she wanted to go away?

A No. But she appeared to be very concerned about not letting her husband know that she was arrested. To the point where I did agree with her that after the interview, or after the tape recording of the interview, I would take her back to the receiving desk at which time she would be processed and immediately released on bail. She had the money with her, I believe. And that she would talk to her husband at a later time to let him know what had happened. Because at that time the husband wasn't there. Also present (p. 10) was her mother. And she did not want her mother to know what was going on, also?

Q Detective, how soon after you came into the room with Detective Paekukui did Ms. Roman write this statement for you, State's Exhibit 3 for identification?

A You mean start the statement?

Q That's correct.

A I would say within five to ten minutes.

Q Is that statement, State's Exhibit 3 for identification, in substantially the same condition as the original was on January 15th when executed by Ms. Roman?

A That's correct.

MR. GARDNER: Your Honor, the State would move into evidence State's Exhibit 3, the statement of Ms. Roman authenticated by the Detective.

MR. BARTHOLOMEW: For the purposes of this hearing, no objection.

THE COURT: Received.

MR. GARDNER: The State has no more questions for this Detective.

THE COURT: Mr. Bartholomew.

MR. BARTHOLOMEW. Thank you, Your Honor.

CROSS EXAMINATION

BY MR. BARTHOLOMEW:

Q Detective, when you came into the room where (p. 11) Ms. Roman was with Detective Paekukui, that was because Detective Paekukui summoned you; is that correct?

A That's correct.

Q You were certainly aware that Ms. Roman was taking a polygraph test that afternoon?

A Yes.

Q In fact, you had arranged for that to be done; is that correct?

A That's correct.

Q And you said a little earlier that this was a routine part of the investigation. You don't do a polygraph test in every rape complaint; do you?

A No. Only when I feel it might be necessary if there are discrepancies in the victim's statement or discrepancies from the evidence that I gather on that particular case.

Q In this particular case, then, based on your investigation you found some that you viewed as discrepancies?

A Yes.

Q So you requested or asked Ms. Roman to take a polygraph exam?

A That's correct.

Q Were you aware of any discussion between Ms. Roman's then attorney and the authorities about whether she would have to return to the prison to serve the balance of her (p. 12) week-ends?

A Would you repeat the question?

Q Yes. I am asking if you remember if you were a party to any discussions that may have included Ms. Roman's attorney at that time – not me – about whether or not she was going to be required to continue serving the balance of the week-ends that remained in her sentence. Do you recall any such discussion?

A Talking with her attorney about going back to prison?

Q That's correct.

A I recall talking to a prosecutor. But I don't recall talking to her attorney per se, not off-hand. But there are a lot of people I talked to, because we had to set up some security measure at the time of the allegation to assure her assistance, because she had to go back for the weekend.

Q It was under discussion, at least, to at some time approach the court and ask that she not go back for the remainder of her term?

A That's correct.

Q And the outcome of the polygraph test was something that was going to affect any decision about that?

A That's false.

Q That's not true?

(p. 13) A That's not true.

Q Is it true that Ms. Roman was informed that for such a thing to be considered she must take the polygraph test?

A No.

Q Not by you?

A As far as I know, not by anyone, because the polygraph test was after the fact per se.

Q O.K. You said a little while ago that you read that portion of the HPD-252 form that's typed at the bottom, to Ms. Roman?

A That's correct.

Q Isn't it also true that you did that reading after you came back and were in the process of tape recording the statement? That's when you did that reading?

A I don't recall if I read it to her after she finished it, before the recording, or if it was during the recording itself. I am not sure.

Q And isn't it what happened that after she decided she would come with you to make a statement the two of you came to a room, you told her to start on her statement, and you went looking for the lieutenant?

A Yes.

Q At that time you did not stop and read that little waiver to her before she started writing the statement; (p. 14) did you?

A No, I read it to her after she was finished.

Q That's correct. After she was finished filling out the statement.

A That's correct.

Q And when she signed it in your presence?

A Before she signed it, yes, in my presence.

Q And when you saw Lieutenant Neely – You said when you looked for him the first time you could not find him.

A That's correct.

Q And the reason you were looking for him was to find out what you were to do under the circumstances?

A Normally our procedures are we apprise the lieutenant as to the progress of our investigation. And because the polygraph showed deception I felt that he should know about this particular investigation. That's why I wanted to confer with him, to let him know that the victim did show deception.

Q And you couldn't find him, but then you looked for him a second time.

A That's correct.

Q All this happened within about a half-hour period.

A Yes.

Q And you did find Lieutent Neely the second time and told him and he instructed you to arrest Ms. Roman.

(p. 15) A That's correct.

Q When you returned and Ms. Roman signed the statement did you inform her at that point she was under arrest?

A That's correct.

Q Before she signed her statement?

A If I recall correctly, we talked about it. She already finished writing out her statement form. I explained to her when I came back that I wanted to tape record her statement that she had just written and that she would be placed under arrest.

Q So you are saying that you told her that she was in effect under arrest because she wasn't going anywhere at that point; right?

MR. GARDNER: Your Honor, I object. That's misstating the testimony.

MR. BARTHOLOMEW: He can agree or disagree, Your Honor.

THE COURT: Overruled.

Q (By Mr. Bartholomew) In fact, at that point she was under arrest; was she not? She wasn't leaving that premises?

A That's correct.

Q And you told her she was going to be placed under arrest?

A Yes.

(p. 16) Q But you did not tell her that before she started writing out that statement?

A No. Because I didn't have any intention of arresting her at that point.

Q I think you said that in your view the Miranda warnings weren't necessary at that point because she had already made a spontaneous statement in your presence?

A No. I had no intention of arresting her, so I didn't have any need to warn her at that point.

Q What about when Detective Neely told you to arrest her? At that point you intended to arrest her.

A Well, when Lieutenant Neely informed me to arrest her, at that point I should have warned her of her constitutional rights. But I did not.

Q You told Detective Paekukui about your concerns about the discrepancies in the case before the polygraph; didn't you?

A Yes. We conferred about the investigation, my investigation.

Q So he was fully informed of your at least suspicion that something was not as it appeared in this case, before the polygraph.

A To a certain degree, yes.

Q How far from the place where the polygraph was conducted was the interrogation room where Ms. Roman was (p. 17) taken by you to fill out her statement?

A It's within the same building, on the same level. It's approximately, I would say, fifty yards.

Q From the time that you were first informed by Detective Paekukui that in his view Ms. Roman had failed the polygraph test until the time she was placed under arrest was about thirty minutes?

A Approximately, yes.

MR. BARTHOLOMEW: Nothing further, Your Honor.

THE COURT: Mr. Gardner.

MR. GARDNER: I have no redirect, Your Honor.

THE COURT: Thank you.

(The witness exited the courtroom.)

MR. GARDNER: Your Honor, for the purposes of this hearing the State is not going to call any more witnesses and would rest.

THE COURT: O.K.

MR. BARTHOLOMEW: Your Honor, the Defense will call the Defendant, Haila Diane Roman, to the stand.

(p. 18) HAILA DIANE ROMAN

the Defendant, called in her own behalf, duly having been sworn to tell the truth, the whole truth, and nothing but the truth, assumed the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. BARTHOLOMEW:

Q Would you please state your name for the record.

A Haila Diane Roman.

Q Is that Mrs. Roman?

A Yes, it is.

Q Mrs. Roman, do you recall the date of January 15th of this year and some things that happened to you during that day?

A Yes, I do.

Q And just preliminarily, you were at the police station; is that correct?

A Correct.

Q Why were you at the police station, as you understood it?

A To take a polygraph test.

Q Why were you to take a polygraph test?

A Because the attorney I was working with was going to see about getting me pulled out of the women's facility so I would not have to finish my sentence out there.

Q What was the nature of the sentence you were (p. 19) serving during all of these events?

A I had week-ends.

Q Approximately from when to when were you required to serve week-ends?

A From October 3rd to March 15th.

Q Did you make a report of any kind to the authorities in early Janaury?

A Yes, I did.

Q Basically what was the nature of that report?

A That I had been sexually assaulted by two of the ACO's.

Q It was that matter that you were to take a polygraph exam about?

A Yes, it was.

Q What was your understanding about what the consequences might be to you if you refused to take the polygraph exam?

A I wasn't aware there would be any consequences. I thought it was entirely voluntary.

Q Did you understand that the matter had anything to do with whether you would have to serve your remaining week-ends?

A Oh, yes. I was told that if I passed the polygraph that it would go to court and it would go before the judge and that my week-ends would be suspended.

(p. 20) Q Mrs. Roman, would you pull the microphone slightly closer to you so we can hear you a little better. Thank you.

When you went down to the police station, about what time was it?

A I believe we got there about 1:30.

Q When you say "we", who are you referring to?

A My husband, my mother, and myself.

Q Who did you see when you got down there?

A Detective Fujinaka was the first person that I talked to.

Q And?

A And he took me to Paekukui.

Q That's Detective John Paekukui and the gentleman that testified this morning?

A Yes, sir.

Q Were your husband and your mother allowed to come with you when you went to see Detective Paekukui?

A No, they were not.

Q So they remained in some public part of the police station?

A Yes.

Q From the time that you first went to see Detective Paekukui, starting at that point, please tell the Court what happened.

A We went over the forms that I would need to fill out.

(p. 21) Mr. Bartholomew: Excuse me, Your Honor. May I have State's 1 and 2.

Q (By Mr. Bartholomew) Mrs. Roman, are these the forms you are referring to?

A Yes, they are.

Q And you recognize these as being Xerox copies of the papers that you were shown that day?

A Yes, I do.

Q I would like to call your attention to state's Exhibit 1, which is titled Warning Persons Taking a Polygraph Examination of Their Constitutional Rights. You say that Detective Paekukui showed you that form?

A Yes, he did.

Q You went over it with him?

A Yes.

Q And you signed it?

A Yes.

Q What did you understand you were waiving or not waiving at the point you signed that particular form?

A I was under the impression that my attorney wasn't going to be there when I was being questioned for the polygraph test.

Q What did you understand with regard to anything you might say during the polygraph examination?

A I never thought it would he held against me. I (p. 22) didn't feel I had anything to hide.

Q But did you understand from the form that what you said during the polygraph examination may or may not be used against you?

A No, I didn't.

Q Maybe I should rephrase that question.

A Please do.

Q All right. Do you see, Mrs. Roman, where it states on this form that any statement you make may be used in court?

A Yes, I do.

Q Did you understand that statement?

A Yes, I did.

Q Are you saying that you understood that any statement you made during the polygraph may be used against you in court?

Mr. Gardner: Objection, Your Honor. He's now leading.

The Court: Overruled.

The Witness: I'm sorry. Repeat the question.

Q (By Mr. Bartholomew) Did you understand or not that statement you made during the polygraph examination could be used against you in court?

A Yes, I did.

Q Did Detective Paekukui say anything to you at the (p. 23) time you filled out this form about what might happen after the polygraph exam was completed?

A No, he did not.

Q Did Detective Paekukui inform you that he intended to interrogate you after the polygraph exam was completed?

A No, he did not.

Q Did he tell you that things you said after the polygraph exam was completed might be used against you in court?

A No, he did not.

Q Did Detective Paekukui tell you that if you failed the polygraph exam in his view that you may be arrested for false report?

A No, he did not.

Q After you filled out this form and signed it you took the polygraph exam; is that right?

A Yes, I did.

Q Going to the point where the polygraph exam was over, please describe what happened immediately after the polygraph exam ended.

A He left the room.

Q "He" meaning Detective Paekukui?

A Yes.

Q How long was he gone?

A Maybe five minutes.

(p. 24) Q And while he was gone where were you?

A Sitting in the chair.

Q Was that the same chair you had been in during the exam?

A Yes, it was.

Q Did the Detective return?

A Yes, he did.

Q This was after about five minutes?

A Yes.

Q What, if anything, happened when he returned?

A He came in and said "We seem to have a problem on your statement; you are not being truthful". And I told him "Why would I make up something like that?" And he said "Either you're lying or you're not".

Q After that exchange was anything said?

A I told him I wanted to go home. And he said "Not till we get to the bottom of this".

Q When Detective Paekukui told you that you weren't going to be allowed to go home until "we" get to the bottom of this, what did you understand at that point?

A That I was stuck there, that I was going to have to stay there until he heard what he wanted to hear.

Q What happened after that?

A He was standing by the file cabinet by the door and insisted that I was lying.

(p. 25) Q How far was he from you at that point?

A At that point I was sitting on the chair next to the file cabinet. So maybe from here –

Q You observed Detective Paekukui in the courtroom this morning?

A Yes, I did.

Q You observed his manner and his tone of voice during his testimony?

A Yes, I did.

Q Was that the same manner and tone of voice that you experienced?

A No, it was not.

Q Explain how the Detective behaved at the time.

A Quite arrogant. Very authoritative. Intimidating. And almost mean in his tone.

Q How long was it that the Detective sort of stood there next to the file cabinet and insisted that you were not telling the truth?

A Maybe five minutes.

Q During that period of five minutes what were you doing, if anything?

A Just sitting there trying to convince him that I wasn't lying.

Q What happened after that five minutes?

A I just went "O.K., then I'm lying".

(p. 26) Q Why did you do that?

A I wanted to go home. I wanted it over.

Q And was there any other thing that was on your mind at that time?

A Yes. There was a break between the first test and the second test, and I told him that every time he used a question with those names in it that I felt my hand and everything tingle. At that point he also told me, "Well, you're lying or you're not lying". So when it was all over, he told me "You're lying". I figured he's not going to believe me if I sit there and talk for a week. So then I told him I was lying and I would say anything that he wanted to hear.

Q Why was it you would say anything he wanted to hear?

A Because he was more ready to believe that than he was the truth.

Q What difference did it make to you whether Detective Paekukui believed you?

A I don't know.

Q I figured if he believed me, everybody else would, I guess.

Q Was it your understanding that you were going to have to return to the prison the next week-end?

A Yes, that had already been determined.

Q What, if anything, were your concerns about that?

(p. 27) A My safety. The harassment. You know, basically how I was going to be treated when I went back.

Q When you say how you were going to be treated, do you have any particular people you are referring to?

A The ACO's

Q Which ACO's

A The two men and any of the other ones.

Q Did that concern play any part in your decision to tell Detective Paekukui that you had been lying?

A I felt that by telling him I was lying and dropping the charges that they would leave me alone out there. The week prior to that they put me in so-called protective custody. That was a nightmare. I didn't want to go through that again. So I figured I would just stop everything.

Q At some point did Detective Fujinaka appear on the scene?

A Yes. Detective Paekukui left and brought Detective Fujinaka back.

Q When Detective Fujinaka came back with Detective Paekukui, did you say anything at that point?

A No. Detective Paekukui did the talking first.

Q What did he say?

A From what I can recall he said that I had failed the polygraph and that I had admitted that I made the whole story up.

(p. 28) Q Did you say anything to Detective Fujinaka about that?

A He sat down, and Paekukui told me to tell Detective Fujinaka what I had just told him.

Q When you say Detective Paekukui told you to tell Detective Fujinaka, do you mean told or requested?

A He told me to tell Detective Fujinaka.

Q And you told Detective Fujinaka. What happened next?

A He told me I would be arrested and I would have to fill out a statement.

Q You are referring to Detective Fujinaka?

A Yes.

Q Did he tell you anything else?

A Not that I can remember.

Q What happened?

A He took me to another room, put the statement in front of me, and told me to write out what I had just told him.

Q You say he took you to another room. Were you asked to accompany him or told to accompany him?

A I was told to accompany him.

Q When you arrived at that room, what, if anything, did he tell you, or what was the nature of his statement to you about writing out your statement?

(p 29) A That I don't remember.

Q Very simply, were you asked to do it or were you told to do it?

A No, I was told that I had to fill out the form exactly the way that I had told Detective Paekukui and Detective Fujinaka in the polygraph room.

Q Did you perceive that you had any choice at that point about whether you were to do it?

A No, I had no choice.

Q In fact, did you begin to fill out a statement form?

A Yes, I did.

Q Mrs. Roman, do you recognize this, State's Exhibit 3?

A Yes, I do.

Q Is that a copy of the statement form that you filled out at that time?

A Yes, it is.

Q It's in your handwriting?

A Yes, it is.

Q While you were filling out that form where was Detective Fujinaka?

A From what I understand, he had gone to look for a lieutenant.

Q He wasn't with you during that time?

A No, he was not.

(p. 30) Q Did he return?

A Yes, he did.

Q When he returned, what, if anything, did he say?

A He told me to read the statement into the tape recorder and that when he was finished with that he was going to go find the lieutenant again.

Q Were you informed that you were under arrest at that point?

A No, I was not.

Q Did you in fact comply with his instructions?

A Yes, I did.

Q What did you do?

A I read the statement into the microphone.

Q After you were completed with that, what happened?

A He left the room again and then came back and said that I would have to be placed under arrest, do I have $50 for the bail.

Q Did Detective Fujinaka, when he instructed you to fill out that form, tell you that what you put in that form might be used as evidence against you?

A No, he did not.

Mr. Bartholomew: Nothing further, Your Honor.

The Court: Mr. Gardner.

Mr. Gardner: Thank you, Your Honor.

(p. 31) CROSS EXAMINATION

By Mr. Gardner:

Q Mrs. Roman, you indicated that you were informed that if you successfully passed this polygraph test it might result in your being let out on week-ends from this week-end sentence you were serving; is that correct?

A Yes.

Q Who told you that?

A Mel Agena, the attorney.

Q Detective Paekukui did not tell you that; did he?

A No.

Q Detective Fujinaka didn't tell you that; did he?

A Detective Fujinaka had been talking to Mel Agena and the two of them had set up that polygraph for that purpose. I had been in Mel Agena's office when there was a conference call with Detective Fujinaka to arrange it.

Q But my question is Detective Fujinaka did not tell you that successfully passing this polygraph test would result in your being released from week-ends?

A No, he didn't tell me that.

Q When you went down to the police station on January 15th to take this polygraph test, this was your choice.

A Yes.

Q No one forced you to go down there?

(p. 32) A No.

Q You have seen that rights form that Detective Paekukui read to you, State's Exhibit 1?

A Yes.

Q Isn't it true that the Detective informed you of each of those rights that you have?

A Yes, we went down the list.

Q You read them out loud and followed them as he read them?

A Yes.

Q And you clearly understood them; right?

A Yes.

Q And that's why you signed the form?

A Correct.

Q The Detective also indicated he would talk to you about the results of the test?

A Yes, he did.

Q You understood that correctly?

A Yes, I did.

Q Following the test he did indeed talk over with you the results?

A Yes, he did.

Q That's when he informed you that he felt you had not been altogether honest with him?

A Correct.

(p. 33) Q The Detective indicated that within a few minutes you then indicated to him a different story; is that correct?

A That's correct.

Q And following your statement to Detective Paekukui you then wrote out the statement for Detective Fujinaka?

A Correct.

Q That's State's Exhibit 3; is that right?

A Yes, it is.

Q Detective Fujinaka indicated he read to you that statement on the bottom of your written statement; namely, that you had read it to the best of your knowledge, you had been given the opportunity to make corrections on there; is that correct?

A I really do not remember that point. I do not remember him reading me the statement. I remember signing it, him taking the statement and signing it. I am not saying he didn't read them. I am saying I do not remember.

Q Do you remember writing your name?

A On the bottom, yes, I do.

Q Do you remember handwriting or printing your name in the middle of that statement form?

A Yes, I do.

Q Do you also remember scratching out the word "typewritten" and writing in the number "2" to indicate (p. 34) how long the statement was?

A Yes, I did.

Q But you are saying you do not remember him reading to you and asking you if you had given that statement freely and voluntarily?

A No, I do not.

Q No recollection at all?

A May I explain?

Q No, ma'am. My question was you have no recollection at all?

A No, I have not.

Q Ma'am, isn't it true that these alleged sexual assaults you said occurred over a three-month period?

A Correct.

Q That was on a weekly basis?

A Yes, it was.

Q The complaint was made about January 5th; is that correct?

A Correct.

Q Between January 5th and January 15th when the polygraph test occurred, isn't it true Detective Fujinaka worked up a system so that you could telephone for help in the event anything wrong happened while you were there at the correctional facility?

A Yes, he did.

(p. 35) Q Isn't it true that he investigated this incident? To the best you know, he did go forward and investigated your allegations?

Mr. Bartholomew: Irrelevant, Your Honor, in terms of what she thinks about that.

The Court: Sustained.

Q (By Mr. Gardner) But the Detective had set up a system so that you could telephone for help immediately?

A Yes.

Q In the event anything happened?

A Yes, he did.

Q You never relied upon that; did you?

A What do you mean?

Q You never telephoned for help, saying anything went wrong?

A I called every hour on the hour, but I never indicated there was a problem.

Q I see. Finally, when you handwrote the statement for Detective Fujinaka, you indicated that part of the time he was outside of the room; is that correct?

A Correct.

Mr. Gardner: Mrs. Roman, thank you very much.

I have no more questions.

The Court: Mr. Bartholomew.

Mr. Bartholomew: Just briefly, Your Honor.

(p. 36) REDIRECT EXAMINATION

BY MR. BARTHOLOMEW:

Q Mrs. Roman, just a moment ago you told Mr. Gardner that you were informed by Detective Paekukui that he would tell you what the results of the test were.

A Correct.

Q Did you understand by that that you were to be interrogated about any facts of the matter?

A No, I did not.

MR. BARTHOLOMEW: Thank you.

Nothing further, Your Honor.

THE COURT: You may step down.

(The witness, Defendant, returned to her seat at the counsel table.)

MR. BARTHOLOMEW: Your Honor, Defense in this case has no further testimony on this matter. May I proceed to argument, Your Honor?

THE COURT: All right.

MR. BARTHOLOMEW: Your Honor, the basic law that I think applies in this case is set out in the memorandum in support of Mrs. Roman's motion to suppress. I would like to call the Court's attention to some specific language which is cited in the memorandum that comes from State of Hawaii vs. Russo, which is at 67 Haw. 26. And that language is, and it's a quote, Your Honor: The Prosecution may not use (p. 37) statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant, unless it demonstrates the use of procedural safeguards effected to safeguard the privilege against self-incrimination.

That statement of the law in this State means that the government has to show this Court that procedural safeguards were used to protect Mrs. Roman's rights. Procedural safeguards does not mean going through the motions in what, to all intents, based on the evidence that the Court has heard looks more like a deliberate effort to subvert Mrs. Roman's rights. Mrs. Roman was not told that she was to be interrogated after her polygraph exam. She was not told that the waiver that she signed was intended, by the government at least, to operate as a waiver of her rights after the polygraph exam was over and Detective Paekukui engaged upon what he frankly admitted to the Court was his plan from the beginning, interrogating her and breaking her down. And well, it took him five minutes to do it. The Court might conclude from that that Detective Paekukui is a pretty good polygraph man. That's one of the reasons polygraph exams are given. The Court should look closely at this form. It's titled Warning Persons Taking a Polygraph Examination of Their Constitutional Rights. Nowhere does it make clear that someone who takes the polygraph examination is going to be subjected to an (p. 38) interrogation when it's over and that during that interrogation whatever they say may well be used against them. In this case it's even more egregious, Your Honor, because Mrs. Roman was not a suspect in any crime, at least not acknowledged as a suspect in any crime, when she went down there to take the polygraph exam. This is not a situation where she knew that she was a suspect and that anything she might say might be used against her. This was a case where she was the victim of the crime. About the time the exam was over and Detective Paekukui made whatever determination he made on the basis of his polygraph charts that Mrs. Roman was not telling the truth, at that point, Your Honor, Mrs. Roman was no longer a victim – she was a suspect – and at that point the government had an obligation to treat her like a suspect and to treat her fairly. There is law in this State relating to the issue of when Miranda warnings are required. One of the factors – it's not the whole story, but a key factor – is that the point at which the police determined that suspicion has focused on an individual, that it's appropriate at that point to warn the person. I would like to just read to the Court very briefly from a case not cited in the memorandum that has been submitted to the Court. I am not reading this case, Your Honor, because the part of it that I intend to read has legal value, but I think it expresses a point.

This was (p. 39) State vs. Ikaika, 67 Haw. 564. The facts basically are –

THE COURT: The cite?

MR. BARTHOLOMEW: 67 Haw. 564, Your Honor, is the page from which I am reading. The case begins at 563.

Briefly, Your Honor, Mr. Ikaika, the defendant in that case –

THE COURT: Try Ikaika.

MR. BARTHOLOMEW: Thank you very much. At any rate, Mr. Ikaika was initially a witness or believed by the police on the Big Island to be a witness to a murder. And he made statements and he came down to the police department voluntarily to participate in a polygraph examination. I will start reading, Your Honor. It says: At 12:25 p.m. defendant executed a waiver after being apprised of his Miranda rights by Sergeant Flores. Shortly after he executed a waiver form citing his statement was not coerced and he understood his constitutional right to silence, the defendant then took the examination which was found to be deceptive. He was told the polygraph results and that he was going to be held for further questioning. At 1:55 p.m. defendant was again given his Miranda warnings by Sergeant Gilbert Thomas. However, defendant executed an advice of rights form in which he indicated he wanted an attorney present.

The point is, Your Honor, there is no reason why (p. 40) the police, when the polygraph indicates that there may be deception and that the person who came in as a potential witness is now a clear suspect, can't warn of the rights again. Apparently on that occasion the Big Island police found it appropriate to do so. As I said, the issue in that case that the Court decided did not have anything to do with that particular aspect of it, so it's not the law. But it certainly is appropriate police behavior. The government in its memorandum has asserted first that Mrs. Roman was not in custody. That's interesting. Mr. Gardner asked the question this morning of Detective Paekukui when he passed custody of Mrs. Roman to Detective Fujinaka. Which, Your Honor, kind of conveys what was going on down there. From the time Mrs. Roman said "I want to go home" – although frankly I don't think the Court needs to find that Mrs. Roman did say that – there is a credibility issue. Detective Paekukui denies that he made the statement. But from the time she said "I want to go home" and he said "You are going to stay here until we get to the bottom of this", which I am sure the Court in its wisdom might recognize as pretty typical police behavior even though the Detective denied it, which I would assert is also pretty typical police behavior, she was in custody at that point. She certainly had every reason to believe that she was not free to go. She was being interrogated by a police officer in the police (p. 41) station. She was alone. She was in a situation where she might experience some submission to official authority. The Detective was standing, if not immediately over her, right next to her. She was seated. And certainly from the time when Detective Fujinaka came in and said, "Well, it's quite likely you are going to be arrested here", she had no reason to believe she was free to leave at that point. Then she is taken by Detective

Fujinaka away from that place. And certainly at that point there is no question that it had anything to do with the polygraph examination for which she had executed the waiver of rights. She was taken to another room by another police officer, who admitted, again frankly, that there came a point when perhaps he should have rewarned her of her rights. I submit that that point arrived a little sooner than Detective Fujinaka was prepared to admit. The instructions were, "Just fill out your statement". Then he gets instructions to arrest her while she is doing that. And he comes back and says, "Read it into the microphone; and, by the way, you are going to be arrested". And "Gee" – and it's an afterthought – "perhaps I should have given you some warnings". They had it all, Your Honor. They had the verbal statements that were secured or elicited by Detective Paekukui as part of what was his intention from before the polygraph exam. He knew that there was a reason to believe or that Detective Fujinaka suspected there (p. 42) was a reason to believe or that Detective Fujinaka suspected there was something not right about this case. He knew from past experience that it was not unlikely if there were a false report that Mrs. Roman would be charged. And the police concluded that there was. Knowing that, I assert to the Court that these officers deliberately violated Mrs. Roman's rights under the Fifth Amendment and under the parallel provisions of the Hawaii Constitution. It's really under the Hawaii law that we are urging most strongly that her statements should be suppressed. The initial statements which were anything but spontaneous the Detective told you they were the result of interrogation, the result of questions he asked under circumstances when Mrs. Roman was in custody. She had no reason to believe that she was free to leave, from the objective facts of the situation. The statement that followed, the written statement that Mrs. Roman was permitted to sign or urged to sign about the time she got arrested could be considered first either simply inadmissible because it is clearly not covered by the waiver that was signed with the polygraph exam, and she clearly at that point became not only a suspect but she was everything but a defendant, and that alone would be a basis. I would also urge that although it's not specifically argued in a memorandum that this is another situation like one that we had in this Court not long (p. 43) ago where the Court might apply the cat-out-of-the-bag doctrine as to the second written statement. Detective Fujinaka basically told you when he saw that "cat" he felt he could proceed right ahead to get the statement. When he became aware of what he called the spontaneous statement to him and Detective Paekukui, he felt there was nothing stopping him from getting it down on paper. And he proceeded to do so. On the basis of the facts as they have come out in Court and the law, we would urge that the Court should suppress these statements. This is not the kind of procedural safeguard that our Court requires. This is rather an effort, maybe a clever effort, to get around those procedural safeguards while maintaining the semblance of them. I would assert that that is what happened here. It's not fair, and the Court should suppress these statements.

Thank you, Your Honor.

THE COURT: Let's give the reporter a rest and take a recess.

(Recess taken.)

THE COURT: O.K. Mr. Gardner.

MR. GARDNER: Thank you, Your Honor. The best way I can summarize this case, Your Honor, is describe it as a snowball effect. Mrs. Roman claimed she had been raped while in custody in prison. At that point the complaint to her husband snowballed. When he reported it to the police, (p. 44) she tried to explain away what had happened and could not. The State submits that that kind of complaint is extremely serious, and the police department took it serious. They made a good faith and ongoing investigation from January 15th, investigating the complaint, interviewing witnesses, recovering evidence, processing and reconstructing the scene where the incident allegedly occurred. They even worked out a system so this woman could telephone on the hour and give a code word in case there was any kind of problem so she could be immediately removed from the facility if there was another problem. The State submits that during that ongoing investigation the polygraph test was reasonable and a legitimate portion of the investigation. Indeed, repeated efforts were made to accommodate Mrs. Roman in that polygraph test. On the 7th she had an appointment. It was postponed to the 8th. At that point she had cramping. The matter was postponed a week. At that point her health was fine. The test proceeded. The State submits that State vs. Russo, cited by counsel, is inapplicable because this was not a custodial interrogation. In Miranda the Supreme Court cited custodial questioning as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

The State submits that does not fit this case. Mrs. Roman voluntarily came to the police station. (p. 45) She voluntarily took a polygraph test, which was to further investigate the complaint she had initiated. The State submits that she was read her Miranda warnings. One of those warnings was "Anything I say can be used against me in a Court". She said she understood them and signed the form indicating that she understood.

THE COURT: It did not say it can be used against her. It says "Any statement may be used in Court". She may have thought it was going to be used in the rape case.

MR. GARDNER: The State submits the way in which the warnings were given to Mrs. Roman was to carefully let her know she had constitutional rights being protected and safeguarded and that when she waived those rights she did so with the understanding that she was at that point going to be voluntarily making the statement and things could be used in Court. The State submits that the context of the rights were that they could be used against her. Proceeding, Your Honor, the State submits that both the pre-test interview and the post-test interview were part and parcel with the polygraph examination. The reply to the second question was responded to and explained to Mrs. Roman that she would be told the results. Until she opened her mouth and said, "I want to change my story; this is what really happened", and told that statement, the State submits she was never a suspect. Certainly there were discrepancies with the story. (p. 46) But with six different rape allegations over a three-month period Detective Paekukui said, "Sure plenty of ground to be contradicted". The investigation and polygraph were to clarify and give her a chance to explain what was happening so that the investigation was going in the right direction. The State submits coercion did not occur. The statement to the officer during the polygraph test and then the statement a few minutes later changing the story were not coerced. And when Detective Fujinaka came in and Detective Paekukui indicated she changed her story and she spontaneously said, "I lied; I was never raped", that certainly was a spontaneous utterance. No coercion existed there, nor was any alleged in the closing argument by counsel regarding that particular statement. She then was taken to a room fifty yards away where she wrote out her statement with the detective gone. The Court can compare her oral statement to Detective Fujinaka to see if there is any coercion. The State submits they are word for word the same. And with the detective out of the room that also removed the idea that she was coerced or forced to make a written statement word for word to resemble the original oral statement. Also, Mrs. Roman was then read the form saying, "you" have not been coerced or forced. She conveniently forgets being told any of that. The State submits that's incredible. Continuing, (p. 47) Your Honor, the State submits that Mrs. Roman's main concern when she changed the story appeared to be her husband and family would find out she had been lying and was now facing possible jail and arrest. Now she had to stop the snowball by blaming the police again. Her story is she has been raped and attacked. The police have coerced her. The police have been hovering over her threatening and coercing her. The State submits that's consistent with the snowball effect. But the State submits when given the polygraph test she was not telling the truth. She was informed of her rights, made a knowing voluntary waiver of those rights, told the truth, made a spontaneous decision or voluntary decision to write out her statement to Detective Fujinaka. Based on that, Your Honor, the State submits that the procedural safeguards have been protected. This was not a custodial interrogation until later, or just before she was arrested. I think Detective Fujinaka has admitted that. The State submits that the motion should be denied as to suppression of the oral statement and the spontaneous utterance to both detectives, and we will leave it to the Court's discretion regarding the written statement made later to Detective Fujinaka. That State submits this woman's rights were protected. She was protected by the police trying to investigate her complaints until her own fabrications collapsed on themselves.

(p. 48) Thank you, Your Honor.

THE COURT: Mr. Bartholomew.

MR. BARTHOLOMEW: Briefly, Your Honor. You can't make a knowing and intelligent and voluntary waiver unless you know what you are waiving. It may be clear that to Detective Paekukui the pre-test interview and the test and the post-test interrogation is all part of this exam. Obviously, it is. The problem is Mrs. Roman wasn't told that she was waiving her rights with regard to what happened after the test was over and what the detective knew is one thing. What Mrs. Roman understood when she signed that waiver is quite another. That really is the heart of the matter when you get down to this case. Mr. Gardner talks about a snowball effect. I think that's a very apt metaphor for what happened here.

The police rolled up that snowball and got it moving because they know once they get it going and they get the statements then they will worry later about whether they can use them. That's exactly what happened here. I submit that based on what the Court heard, the Court can conclude that it was a deliberate effort to subvert Mrs. Roman's Miranda rights. We would urge the Court to so find.

Thank you.

THE COURT: O.K. Recess.

(Recess taken.)

THE COURT: Initially this looked like clearly a noncustodial type of interrogation and on the surface the form informing of constitutional rights appeared to cover the situation. But I think in this case the Defendant is an alleged victim in another sexual assault case. She voluntarily comes in to take a polygraph exam. The constitutional rights and waiver form are given to her and filled out. In reading the form closely these forms appear more the type of form that would be given to a defendant or suspect in an investigation. And that's what bothers me about the way this thing was handled. In this case the detectives were already aware of some discrepancies in the Defendant's story. Upon her being given the polygraph examination her answers showed some possible deception. And the detective told her she was not being completely truthful. At this point I think the detective should have warned her that at that point she had the right to remain silent, she did not have to say anything further, she had the right to an attorney, all the rest of the constitutional rights. The detective testified that he continued to talk to her, and he talked about she appeared to have a heavy burden and why doesn't she tell the truth so he could set her free. And to me this is the type of questioning which would reasonably be expected to elicit an incriminating statement. I think her then telling him to sit down and she (p. 50) is going to tell him the truth and that she was lying, that statement should be suppressed. Once the cat is out of the bag, the written statement is no good, also. Also, the written statement being made to the different officers in a different room, clearly Miranda warning should have been given then.

The motion will be granted. I don't think it's necessary to find any deliberate effort to subvert Defendant's rights. Instead, this is a special type of situation where the Defendant, coming in to take the test, there should have been some kind of special warning to tell her that if she happened to fail the test or since her answer showed deception there may be a possibility of her being charged with making a false report. My ruling is really limited to this type of special situation.

MR. BARTHOLOMEW: Is the Court requesting that findings be drawn up?

THE COURT: Yes.

MR. BARTHOLOMEW: Thank you, Your Honor.

THE COURT: I will see counsel in the other case in chambers briefly.

(The proceedings were concluded.)

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